Federal Safety and Health Agency Releases Rules on Food Safety Whistleblower Claims

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The Occupational Safety and Health Administration has issued interim final rules for handling employment retaliation complaints under the FDA Food Safety Modernization Act (FSMA) that will make it more difficult for employers to defend themselves against food safety-related whistleblower claims. OSHA will be accepting public comments on the rules through April 14, 2014.

The FSMA prohibits an "entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food" from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, among other things, provides information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, the FSMA. The FSMA does not define the term "entity," so it is unclear whether supervisors can be individually liable for violations of the FSMA retaliation provisions.

Burdens of Proof under the Statute

The FSMA requires an employee to show that his or her protected activity was only "a contributing factor" in the adverse action alleged in his complaint. The employer, in turn, must demonstrate, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. If the employer meets this burden, OSHA's investigation must end.

Interim Final Rules

OSHA's interim final rules, released February 13, 2014, largely follow other regulations the agency has promulgated under similar whistleblower statutes within its jurisdiction. Here, however, OSHA explicitly embraces the lenient standards adopted by the Administrative Review Board's groundbreaking Sarbanes-Oxley Act ("SOX") retaliation decision in *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 WL 2165854 (ARB May 25, 2011).

Pleading Standard

In its rules, OSHA clarifies that an FSMA retaliation complaint is not a formal document and need not conform to the pleading standards for complaints filed in federal district court demanded by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), or *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Instead, the complaint simply needs to alert OSHA to the existence of alleged retaliation and the complainant's desire that OSHA investigate the complaint.

Furthermore, an employee will be considered to have met his or her burden of showing that his or her protected conduct was a "contributing factor" in the employer's adverse action if the complaint on its face, supplemented through interviews of the complainant, alleges the existence of facts and direct or circumstantial evidence to meet the required showing. Notably, the rules explain that the complainant can meet this burden simply by alleging the adverse action took place shortly after his or her protected activity, or even years later, if the employer did not have an opportunity to retaliate until then.

Reasonable Belief Standard

Before *Sylvester*, a split of authority existed concerning the evidence an employee needed to show he or she reasonably believed the employer's conduct violated SOX. The *Sylvester* Board held, however, that a "reasonable belief" regarding a violation requires the complainant to have a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violated the law. The subjective prong of this two-part requirement is satisfied as long as the complainant actually believed the conduct complained of violated the relevant law. The objective prong typically is determined "based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." The complainant need not show the conduct complained of

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constituted an actual violation of law, and the whistleblowing activity is protected if it was based on a reasonable belief, even if that belief was mistaken.

Employer's Burden of Proof

To meet the "clear and convincing" evidence standard under the interim final rules, an employer must show it is "highly probable or reasonably certain" it would have taken the same adverse action absent the employee's protected activity. The bottom line is that the employer bears a higher burden of proof than the employee.

Individual Liability

The interim final rules define "covered entity" to mean "an entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food." This is simply a restatement of the statutory language from the FSMA's anti-retaliation provision. The term "covered entity," however, is a term used in the Americans with Disabilities Act, which the majority of courts have interpreted to exclude individual liability.

Next Steps

Employers in the food industry should review the interim final rules and take any complaints regarding food safety seriously. They should review and implement anti-retaliatory policies, conduct training, thoroughly investigate, communicate and take effective action when complaints arise, and correct any violations. Equally important, when considering an adverse action against any employee, employers should determine whether the employee has "provide[d] information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, the FSMA." If so, before acting, the employer should make sure its decision is based on clear and convincing evidence and is sufficiently documented, so that it can later meet the higher burden of proof established by OSHA if the employee files a retaliation complaint under the FSMA.

If you have any questions regarding these and other developments or require assistance in submitting comments on the interim final rules, please contact the Jackson Lewis attorney with whom you regularly work.