

PUBLICATION

When the Bagpipes Sound: OSHA Releases Interim Final Rule for ACA Whistleblowers

March 11, 2013

OSHA has released an interim final rule setting out procedures and time frames for responding to whistleblower complaints filed under the Affordable Care Act (ACA), which prohibits retaliation against workers who report suspected violations of the health care law. The public comment period will run for 60 days after the rule's publication, which was February 27.

What Happened?

The Occupational Safety and Health Administration (OSHA) released an interim final rule on February 22, 2013, setting out procedures and time frames for responding to whistleblower complaints filed under the Affordable Care Act (ACA), which prohibits retaliation against workers who report suspected violations of the health care law.

OSHA requested comments on the rule, which became effective on February 27. The comment period runs for 60 days following its publication. The procedures established by the interim rule "are very similar to those used for whistleblower complaints in other industries," OSHA said.

Who Can File an ACA Whistleblowing Complaint?

Section 1558 of the ACA amended the Fair Labor Standards Act, to cover employees who report suspected violations of the ACA's consumer protections. Workers who give general information to their employer, the federal government or a state attorney about acts or omissions they reasonably believe violate Title I of the ACA — which prohibits denying insurance because of pre-existing conditions or using factors such as medical history to set premium rates — are protected from retaliation. The ACA also prohibits retaliation against employees who receive health insurance tax credits that could translate to a tax penalty for certain large employers.

Retaliation complaints must be filed within 180 days of the alleged violation, which occurs when the retaliatory decision has been made and communicated to the worker, although the time for filing a complaint can be tolled. Such complaints need not be written. Moreover, any person can file a complaint on a worker's behalf provided the worker consents.

Health insurance issuers have been prohibited from retaliating against their employees who have engaged in identical protected activity since 2010. Beginning in 2014, such issuers will also be barred from retaliating against non-employees as well by, for example, limiting or ending an individual's health insurance coverage. Since its passage, OSHA has received approximately 32 ACA whistleblower cases.

What Happens When a Complaint is Filed?

Provided the complainant establishes a *prima facie* showing of retaliation, OSHA will investigate whether reasonable cause exists to believe that retaliation has occurred. The assistant secretary for OSHA, in turn, will issue written findings within 60 days of a complaint's filing about whether reasonable cause exists to believe

that the complaint has merit. Complainants may then file suit in federal district court within 90 days of receiving this determination, or if more than 210 days have passed since the filing without a final decision being issued.

How Do I Get More Information?

For more information about OSHA's new interim final rule on whistleblower complaints related to the ACA, and how a complaint could affect your business, please contact any of our more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.