Employee Benefits and Executive Compensation Client Alert

Occupational Safety & Health Administration Extends Broad Whistleblower Protections to Employees Complaining of Violations of the Patient Protection and Affordable Care Act

by S. Tony Ling and Richard J. Zito

On February 22, 2013, the Department of Labor (DOL), in conjunction with the Occupational Safety & Health Administration (OSHA), issued its interim final rule articulating standards and procedures for the handling of retaliation complaints in connection with an employer's alleged failure to comply with the Patient Protection and Affordable Care Act ("PPACA" or "the Act"). In essence, this rulemaking extends protections for whistleblowers that are largely consistent with those investigated and enforced by OSHA in other contexts. This Client Alert outlines (i) the statutory and regulatory background for the interim final rule; (ii) the types of employee activities protected thereunder; and (iii) the administrative procedures by which PPACA-related retaliation complaints are investigated and adjudicated.

Statutory and Regulatory Background

Section 1558 of PPACA established PPACA-related whistleblower protections by adding section 18C to the Fair Labor Standards Act ("FLSA"). Section 18C(b)(1) expressly incorporates the procedural protocols for whistleblower complaints (as discussed below) found in the Consumer Product Safety Improvement Act of 2008 ("CPSIA").

Protected Employee Activities and Prohibited Employer Conduct

There are two broad categories of protected activities enshrined by the anti-retaliation provisions of section 18C. The first, at section 18C(a)(1), is an employee's receipt of any cost-sharing subsidy under PPACA section 1402; the second, at sections 18C(a)(2) through 18C(a)(5) covers, the more conventional whistleblower scenario in which an employee observes what he or she perceives as unlawful conduct, takes steps to bring the conduct to light, and suffers adverse employment action as a result.

The interim final rule, found at 29 CFR 1984, identifies any employee's receipt of tax sharing or a cost-sharing reduction pursuant to PPACA as entitling that employee to whistleblower protection under FLSA. The rationale for this inclusion is to prevent an employer from taking retaliatory action or otherwise discriminating against employees whose lack of coverage might expose such employer to a tax penalty under the PPACA. Notably, there is no time limit defined in the regulations regarding this point, making it conceivable that once an employee receives the cost sharing subsidy under section 1402 of PPACA, he or she is by virtue of that receipt in a protected class in perpetuity. Indeed, this literal reading of the statute and regulations could afford such an employee with whistleblower protection throughout his or her lifetime, across multiple employers.

Also expressly protected by the interim final rulemaking relates to the traditional type of whistleblower activity, i.e., any effort intended to bring to light an employer's noncompliance with PPACA. Interestingly, only alleged violations of Title I of the Act–including most of the insurance company accountability provisions–are covered. 29 CFR 1984.102(b) enumerates protected

employee conduct and includes both providing information about an alleged violation as well as merely refusing to participate in a job task that the employee perceives as a violation of Title I of the Act. Problematically, an employee need only "reasonably believe" a violation exists in order to be protected under the Act's whistleblower protections. In other whistleblower contexts, courts have construed this "reasonable belief" broadly, leading to whistleblower coverage even in instances where no underlying unlawful activity was found.

Procedural Issues

PPACA's whistleblower provisions incorporate the procedural framework found in the CPSIA. Thus, if an employee is covered under Section 18C, he or she has 180 days from the alleged retaliation to file a complaint. A filing of a complaint is sufficient to trigger an agency investigation unless the employer-respondent can offer clear and convincing evidence that the employer would have taken the same adverse action even in the absence of the protected activity. Compiling the evidence to satisfy such a standard can be cumbersome for many, if not most, employers to meet and accordingly most complaints under Section 18C will likely proceed through the steps of a formal investigation and issuance of written findings, including a determination of whether there is "reasonable cause to believe" that retaliation occurred. If the DOL determines that there is such cause, it will issue a preliminary order mandating a panoply of potential temporary remedies to the complainant, including reinstatement, back pay, other compensatory damages, and attorneys' fees.

Employers who find themselves in this predicament can then avail themselves of a hearing in federal district court or before an administrative law judge, which would stay all relief described in the preceding paragraph (with the exception of reinstatement) pending a final order. In sum, the procedural rules are complainant-friendly, making it all the more important (and cost-effective) for employers to take preventative steps to prevent these whistleblower complaints in the first place. Barring that, employers should consult with their counsel and human resources staff to ensure that employee activity that might be proper grounds for an adverse employment action is well documented. Adherence to transparent personnel protocols and other HR best practices remain the best strategy for ultimately avoiding liability under PPACA's whistleblower provisions.

Conclusion

It should come as no surprise that the advent of federal healthcare reform brings with it numerous new obligations (and potential pitfalls) for employers. The whistleblower provisions of PPACA represent one such challenge, evincing Congress' intent to encourage compliance with the Act by providing broad employee protections. Accordingly, employers should ensure that their processes pertaining to adverse employment actions remain robust.

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