

in the news

Food and Agriculture



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For Whom the Whistle Blows

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The Occupational Safety and Health Administration (OSHA) has taken the next steps to ensure compliance with the 2010 amendments to Section 402 of the Food Safety Modernization Act (“FSMA”), which contain a robust set of whistleblower provisions that protect employees working in the food industry. The OSHA interim final rule establishes the manner for handling retaliation complaints as part of the FSMA, including, among other things, procedures and time frames for employee complaints to OSHA; appeals of OSHA’s written findings; and judicial review of the Secretary of Labor’s (“Secretary”) final decision. Because of the broad definitions contained in both the statute and the interim rule, all entities engaged in manufacturing, processing, packing, transporting, distributing, receiving, holding, or importing of food should be cognizant of the provisions of the rule and ensure that they educate employees about the provisions of the Act and train appropriate individuals as to how to handle any comments that may constitute “whistleblowing” under the Act.

Applicability and Protected Activity

Under the terms of the 2010 Amendments to the FSMA, an employee (or any other person acting for and on behalf of the employee) who provides information, or is about to provide information, to an employer, the federal government, or a state attorney general regarding an act he or she “reasonably believes” may violate the Food, Drug and Cosmetic Act, is



protected from retaliation for the whistleblowing activity. Protection also exists if the individual testifies or participates in proceedings concerning violations of the Act or if he or she refuses to participate in activity that is reasonably believed to violate the statute.

An employee does not need to demonstrate the disclosure was an actual violation of the FDCA or other applicable law to receive protection (or maintain a cause of action under) the Act. Rather, Section 402 of the FSMA contains a “reasonable belief” standard similar to other whistleblowing statutes. Generally, this standard requires only that the employee have a subjective, good faith belief of a violation, even if the belief is incorrect.

Procedure Governing Section 402 Claims

The interim rule recently released by OSHA provides that an employee must file a complaint with OSHA within 180 days after the date on which the alleged retaliatory adverse action occurred. OSHA will investigate the claim, and based upon the results of its investigation, within 60 days of the employee’s filing of the complaint with OSHA, will issue its written findings determining whether or not there is reasonable cause to believe that the complaint has merit. If the employee meets his or her burden of showing that the protected activity was a contributing factor to any adverse action taken by the employer, OSHA can order preliminary relief in favor of the employee, including reinstating the employee, providing for back pay (including interest), and/or awarding compensatory damages. If the employee fails to make this showing or the employer rebuts the showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity, OSHA can dismiss the complaint. If no objection is filed by either the employee or the employer within 30 days of their respective receipts of the written findings, the written findings and any preliminary order become the final decision and order of the Secretary.

The interim rule allows for review of the initial OSHA decision by an Administrative Law Judge (“ALJ”). This decision, in turn, may be reviewed by the DOL Administrative Review Board (“Board”) If the ARB does not grant the petition for review, the decision of the ALJ becomes the final decision of the Secretary. If the Board accepts a petition for review, the ALJ’s factual determinations will be reviewed under the substantial evidence standard, and the Board’s determination will become final decision of the Secretary.

The administrative process may continue if the Secretary fails to issue a final decision within 210 days after the employee files the complaint with OSHA, or within 90 days after receiving a written determination from OSHA of the findings of its investigation. At that point, the employee may file an action for de novo review in the appropriate federal court. A jury trial is permitted. However, it is the Secretary’s position that a party may not initiate an action in the appropriate federal court after the Secretary issues a final decision Accordingly, a party should file a timely objection to the Assistant Secretary’s written findings in order to preserve the right to file an action in federal court. The provisions of this statute are not exclusive and an employee may pursue other remedies for retaliation provided by federal or state law, although an employer may have arguments under some theories that certain common law claims are barred due to the existence of the federal remedy.





Five Steps to Compliance

Employers with any relationship to the food industry should be aware of the potential of this new cause of action and take steps to ensure that whistleblowing claims are handled appropriately in order to minimize potential liability. Specifically, employers should:

1. Review internal policies, procedures and practices to ensure that effective anti-retaliation policies, procedures and practices (including avenues for an employee to complain) are in existence and up-to-date;
2. Build FSMA whistleblower reporting procedures into employee orientation and training programs;
3. Establish and monitor compliance with policies, procedures and practices (including the reporting of incidents by employees and investigations of compliance);
4. Educate managers and C-level executives on the employer's policies, procedures and practices to ensure both that any "complaint" is adequately and appropriately addressed and to avoid any appearance of retaliation, and
5. Manage the disclosure of confidential information.

Any comments and additional materials to be considered by OSHA relating to this interim rule must be submitted to OSHA by April 14, 2014



For More Information

For questions about OSHA's interim final rule, how it fits within the overall framework of the FSMA, and how to ensure that your organization is protected from whistleblower complaints under this statute, please contact either of the authors of this alert:

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