

# ACA Whistleblower Complaint Procedures

## Labor & Employment Law Update

By Kelly Haab-Tallitsch on November 3, 2016

On October 11, 2016, the Occupational Safety and Health Administration (OSHA) issued the final rule creating procedures for handling whistleblower complaints under the Affordable Care Act (ACA). The ACA prohibits employers from retaliating against employees who report alleged violations of the act's health coverage reforms or who receives a premium subsidy or tax credit for purchasing individual health coverage through a state or federal exchange. A covered employer can receive a penalty if an employee receives a tax-credit or premium subsidy for coverage through an exchange. The final rule addresses the concern that the relationship between the employee's receipt of a premium tax credit and the potential penalty imposed on an employer could create an incentive for an employer to retaliate against an employee.

To demonstrate unlawful retaliation under the ACA, an employee need only show that the protected activity was a *contributing factor* to an adverse employment decision—rather than the “but for” cause. An employer will then have to present “clear and convincing evidence” that it would have taken the same action even if the employee had not engaged in the protected activity.

Substantially similar to the interim rule on ACA whistleblower claims published in 2013, the final rule mirrors many of the provisions related to whistleblower protections under other statutes that OSHA enforces and includes procedures and time frames for employers and employees to appeal an OSHA decision.

### Complaint Procedures

An employee must file a complaint within 180 days of the alleged retaliation. The complaint can be oral or written, made by telephone, in person or electronic means, and may be made in any language if the employee can't file in English. Anyone can file a complaint on behalf of an individual, provided that individual agrees.

Once a complaint is submitted, OSHA must provide written notice to the employer, provide the employer and employee an opportunity to submit a response and meet with the investigator to present statements from witnesses, conduct an investigation, and issue notification of its findings. If OSHA finds reasonable cause to believe that retaliation has occurred, a preliminary order will be issued, which can include job reinstatement, lost wages, restoration of

benefits, special damages (i.e. emotional distress) and attorneys' fees and costs.

Either party may then request a hearing by a Department of Labor administrative law judge (ALJ) and an ALJ's decision may be appealed to the department's administrative review board.

### **Employer Action Steps**

To reduce the risk of an ACA whistleblower claim, applicable large employers (as defined by the ACA) should:

1. Ensure compliance obligations are adequately addressed;
2. Identify ethics and legal compliance as a business priority;
3. Implement and distribute a code of ethics that makes a commitment to compliance explicit;
4. Include a well-publicized and effective internal complaint procedure; and
5. Train supervisory staff! Make sure supervisors know what constitutes protected activity, retaliation, etc.

By taking the above steps, an employer can minimize chances employees will raise ACA whistleblowing claims and maximize chances that any such claims are raised and resolved internally.

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