

Another Statute With Broad Whistleblower Protections The FDA's Food Safety Modernization Act (FSMA)

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In April, the U.S. Occupational Safety and Health Administration (OSHA) issued its final rule governing unlawful retaliation against workers who complain about or disclose food safety concerns to their employer or to OSHA.

The final rule, which sets forth OSHA's process for handling whistleblower complaints under Section 402 of the Food Safety Modernization Act (FSMA), covers companies in food manufacturing, processing, packing, distribution, holding, importation, and transportation. The rule stems from the broad food safety regulations enacted by President Obama in January 2011, in the aftermath of fatal outbreaks of food contamination in 2010.

Broad Definition of Protected Whistleblower Conduct

Under the FSMA, employers are prohibited from discharging or discriminating against any employee who engages in protected whistleblower activity with respect to his or her compensation, terms, conditions, or other privileges of employment. Section 402 prohibits not only tangible adverse employment actions such as termination and demotion, but also any action that may dissuade a reasonable employee from engaging in protected activity.

Although modeled after other whistleblower statutes that OSHA enforces, the FSMA broadly defines protected whistleblower activity to include:

- (1) provided, caused to be provided, **or is about to provide or cause to be provided** to the employer, the federal government, or the attorney general of a state information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of the FSMA or any order, rule, regulation, standard, or ban under the Act;
- (2) testified **or is about to testify** in a proceeding concerning such violation;
- (3) assisted or participated **or is about to assist or participate in** such a proceeding; or
- (4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this act, or any order, rule, regulation, standard, or ban under this act.

Of the many statutory whistleblower provisions that OSHA enforces, only a handful define protected activity to include employees who **"are about to"** report a violation of the law, testify in a proceeding, or assist or participate in such a proceeding (among them the Surface Transportation Assistance Act, the Pipeline Safety Improvement Act, and the Consumer Product Safety Improvement Act). As a practical matter, this definition arguably expands protected activity to encompass the employee, faced with discipline or discharge, who claims that he or she was just about to tell the employer's quality assurance personnel about an unsafe food

practice - even though they had not done so - and the discipline or discharge is therefore retaliatory. However, the whistleblower must prove a causal link between protected activity and the adverse action, meaning the employer must have knowledge that the employee was "about to" lodge a complaint or participate in proceedings at the time the adverse action was taken.

A whistleblower is protected under the FSMA as long as he or she holds a reasonable belief - a subjective good faith belief and an objectively reasonable belief - that a violation of the Act occurred. However, a whistleblower doesn't need to demonstrate that what they complained about actually violated the law. Complaints may be in any form, either verbal or in writing, and must be filed with OSHA within 180 days of when the alleged retaliation occurred.

Given such a broad definition of protected activity, it is important that employers train line managers and supervisors about the importance of dealing promptly with complaints, logging complaints, documenting investigations into the complaint and any actions taken as a result. Importantly, employers should document that any adverse action taken with respect to an employee would have been taken even in the absence of a whistleblower complaint - including documenting poor performance and discipline when it occurs.

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