

## OSHA Issues New Whistleblower Guidelines

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The Occupational Safety and Health Administration (OSHA) has issued a final rule on the procedures, processes, and timeframes for handling whistleblower complaints under the Affordable Care Act (ACA), as well as for hearings before U.S. Department of Labor (DOL) administrative law judges and judicial review of final decisions. The rule became effective October 13, 2016.

The ACA protects employees from retaliation for raising concerns regarding conduct that they believe violates the consumer protection and health insurance reforms found in the ACA, as well as from retaliation for receiving marketplace exchange financial assistance when purchasing health insurance through an exchange, or from getting their coverage through an employer.

Employees who believe that they may have suffered retaliation may file a complaint with OSHA. OSHA has provided a list of those actions which may constitute retaliation, which includes discharge, reduction in pay or hours, demotion, transfer, discipline, threats, or intimidation. An employee who believes that he or she has been retaliated against in violation of the ACA must file a complaint with OSHA within 180 days of the alleged retaliation. Complaints may be filed in person, by fax, or electronically.

Upon receipt of the complaint, the Secretary of Labor must provide written notice to the person or persons named in the complaint (the employer), the allegations contained in the complaint, the substance of the evidence supporting the complaint, and the rights afforded the respondent throughout the investigation. The Secretary must then, within 60 days of receipt of the complaint, conduct an investigation that allows the complainant and employer an opportunity to submit a response and meet with the investigator to present statements from witnesses.

If after conducting an investigation the Secretary finds that there is reasonable cause to believe that retaliation has occurred, the Secretary will notify the employer and issue a preliminary order that may require the employer to abate the violation, reinstate the complainant with back pay and provide compensatory damages to the complainant, as well as all costs and expenses (including attorneys' fees and expert witness fees) reasonably incurred by the complainant in connection with filing the complaint.

The complainant and the employer then have 30 days after the date of the Secretary's notification to file objections to the findings or preliminary order and request a hearing before a DOL administrative law judge. The filing of objections will stay any remedy in the preliminary order, except for preliminary reinstatement of the employee. Unless a hearing before an administrative law judge is requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing before an administrative law judge is held, the Secretary then has 120 days after the conclusion of any hearing in which to issue a final order, which may provide appropriate relief or deny the complaint. Finally, within 60

days of the issuance of the final order, any person adversely affected by the Secretary's final order may file an appeal with the U.S. Court of Appeals for the circuit in which the violation occurred.

In light of this new rule, employers would be wise to review their employment policies and procedures and train their supervisors and management to ensure they are not discriminating against employees in violation of the ACA and are not subjecting them to unlawful retaliation for raising concerns regarding conduct that they believe violates the ACA.