July 11, 2012

On July 10, 2012, the Occupational Safety and Health Administration ("OSHA") issued a final rule implementing the whistleblower provisions of the Consumer Products Safety Improvement Act ("CPSIA"). Those provisions provide employees with protections against retaliation by employer manufacturers, private labelers, distributors, or retailers when an employee engages in one or more of three protected activities. First, an employee is protected if he or she provided, caused to be provided, or is about to provide or cause to be provided to his or her employer, a State attorney general, or the Federal Government information relating to any act the employee reasonably believes to be a violation of the CPSIA or any other statute enforced by the Consumer Products Safety Commission ("CPSC") or any rule, regulation, standard, ban or order enforced by the CPSC. Second, an employee is protected if he or she testifies assists or participates in proceedings concerning a violation of any act or rule enforced by the CPSC. Finally, an employee is protected from retaliation by his or her employer if the employee objects to, or refuses to participate in an activity or task that the employee reasonably believes is in violation of an act or rule enforced by the CPSC. Key provisions of the rule are highlighted below.

Covered entities; prohibited actions

The CPSIA's whistleblower provisions apply to manufacturers, distributors and importers of consumer products, private labelers of consumer products, and retailers of consumer products. A private labeler is defined as an owner of a brand or trademark on the label of a consumer product.

Those entities are prohibited from discharging or otherwise retaliating against an employee because the employee has engaged in a protected activity. Retaliation can include, but is not limited to, intimidating, threatening, restraining, coercing, blacklisting or disciplining the employee with respect to his or her compensation, terms, conditions or privileges of employment.

The complaint and the investigation

OSHA will accept a whistleblower complaint in any form, oral or written, and in any language. The complaint must be filed within 180 days of the date the employee is aware—or should have been aware—of the alleged retaliation. The complaint need not, on its own, be sufficient to state a claim against the employer. If the complaint is not sufficient, the OSHA Assistant Secretary is obligated to interview the complainant to determine whether the complaint, once supplemented, contains a prima facie allegation that the protected activity was a contributing factor in the employer's adverse action. To do this the employee need only show that the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision. The Final Rule states that a temporal inference, *i.e.,* an allegation that the employer's adverse action occurred shortly after the employee's protected conduct, will satisfy the employee's prima facie burden.

If the Assistant Secretary determines that the complaint does not contain a prima facie allegation of prohibited retaliation, he or she will dismiss the complaint without investigation. The complaint will also be dismissed without investigation if, despite the prima facie allegation, the employer can demonstrate by clear and convincing evidence that it would have engaged in the same action absent the protected activity. Assuming the complaint does contain a prima facie allegation of retaliation, the investigation proceeds. The Assistant Secretary's decision whether to investigate cannot be appealed.

Initial findings and preliminary orders

Within 60 days of the filing of the complaint, the Assistant Secretary must issue initial findings. Those findings reflect the Assistant Secretary's determination as to whether there is reasonable cause to believe that the complaint has merit. To find that there is reasonable cause, the Assistant Secretary must determine that the employee has proved that the protected activity was a contributing factor in the alleged adverse action. This burden is very light. A contributing factor is any factor which, alone or in connection with other factors, tends to affect in any way the outcome of a decision. Moreover, the employee's belief that the employer was engaging in a violation of an act governed by the CPSC need not be correct. It is sufficient if the employee had a subjectively and objectively reasonable (but mistaken) belief of the violation.

If the employee meets this burden, the employer must prove, by clear and convincing evidence, that it would have taken the same action in the absence of the protected activity. However, the employee can still prevail by demonstrating that the employer's reason for acting, while true, was only one of the reasons for its conduct and that another reason was the employee's protected activity.

If he determines that there is reasonable cause, the Assistant Secretary is able to order relief including preliminary reinstatement, affirmative action to abate the violation, back pay with interest, and compensatory damages.

The parties have 30 days to appeal to an Administrative Law Judge ("ALJ") the Assistant Secretary's findings and preliminary order regarding reasonable cause. If they do not, those findings become the agency's final decision and order and are not subject to judicial review. If one or more parties do object, any preliminary reinstatement order still takes effect, but other remedies are stayed pending the completion of the administrative proceedings.

If the employer wants to postpone the effect of the preliminary reinstatement order, it will be required to prove that it will incur irreparable injury if the employee is reinstated, that the employer is likely to succeed on the merits of the underlying retaliation claim, that on balance the harm it will incur by reinstating the employee is less than that the employee will suffer by not being reinstated, and that the public interest favors postponing the reinstatement. As OSHA has acknowledged, preliminary reinstatement will be postponed only in exceptional circumstances.

Appeals

If an Assistant Secretary's determination is appealed, the ALJ will conduct a hearing and examine all of the evidence. The normal rules of procedure and evidence do not apply in these hearings. Hearsay evidence, for example, is admissible because OSHA believes that there is often no relevant evidence other than hearsay available to prove an employer's discriminatory intent. At this stage, the burdens of proof are the same as they were when the matter was before the Assistant Secretary: the employee must prove by a preponderance of the evidence that his protected activity was a contributing factor in the employer's adverse action; to prevail, the employer must then prove by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.

The ALJ has 120 days to make its decision. If the ALJ determines that the employee has proven his or her case, the ALJ can order the same remedies that were available to the Assistant Secretary. Again, any order of reinstatement by the ALJ will be immediately effective and will not be postponed pending any appeal unless the employer can demonstrate the "exceptional circumstances" discussed above. All other remedies are effective 14 days after the ALJ's decision, unless the decision is appealed. If no appeal is taken, the ALJ's decision becomes final agency action and cannot be reviewed by a court.

The parties have 14 days to appeal ALJ determinations to the Administrative Review Board ("ARB"). The ARB has 30 days to decide whether to hear the appeal. Its decision not to hear an appeal will be considered a final agency action subject to judicial review. If the ARB decides to hear the appeal, the ALJ's factual determinations will be reviewed to determine whether there is substantial evidence to support them. The ALJ's legal determinations will be reviewed anew. The ARB must issue its final decision

within 120 days of the conclusion of the ALJ hearing.

Federal Court involvement

If no final decision has been issued within 210 days of filing the complaint, or within 90 days after receiving the Assistant Secretary's written determination, an employee can file an action in United States District Court. Once a final agency decision is issued, however, the employee may not bring an action in district court. If the case proceeds in district court, either party can request a trial by jury.

Once the ARB rules on the appeal, or declines to hear the case, any party has 60 days to file an appeal with the United States Court of Appeals for the Circuit in which the violation occurred or where the employee resided on the date of the violation.

Practical implications

The OSHA Office of Whistleblower Enforcement Programs has the broadest employee protection mandate in the federal government—enforcing whistleblower protections contained in 21 federal statutes. The agency's evidence rules make it quite easy for an employee to prove a case but very difficult for the employer to succeed in its defense. It is therefore more important than ever that employers implement effective compliance policies and procedures and train managers to recognize protected activity. Internal reporting of whistleblower-type complaints should be encouraged and an anonymous hotline is recommended. Moreover, an employer must be vigilant throughout the employment relationship, maintaining detailed personnel files on its employees. If the employer is ever forced to litigate a whistleblower retaliation claim it will face very high burdens and must be ready to present evidence documenting the legitimate, non-discriminatory business reasons for all adverse employment actions.

If you would like to discuss these issues further or have questions about this *Alert,* please contact one of the attorneys listed above.

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