

ObamaCare's Whistleblower Protections go into Effect

2 min read

Feb 28, 2013

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Though President Obama and Congress established broad requirements in the Affordable Care Act (aka ObamaCare), they tasked federal agencies with filling in myriad blanks regarding implementation. The agency rules that are emerging, often with little fanfare, can have an enormous effect on how the law operates in the real world.

One important rule regarding the handling of retaliation complaints became effective this week.

ObamaCare includes protections for “whistleblowers” who complain about violations of the law’s provisions. Individuals, for example, are protected from retaliation if they report that an insurer has denied coverage on the basis of a preexisting condition or that they have been denied access to tax credits that the law provides. Employees are further protected if they testify in a proceeding against a violator or refuse to participate in a violation.

These protections, which were added as Section 18C to the Fair Labor Standards Act, became effective in March of 2010, when the health care law was enacted. Exactly how the whistleblower provisions would work in practice has been unclear, until now.

Under an interim rule issued by the Department of Labor’s Occupational Safety and Health Administration (OSHA), an employee who believes he or she has been retaliated against may file a complaint with the Secretary of Labor within 180 days of the alleged retaliation. The Secretary must then notify the alleged violator, and each side has 60 days to conduct an investigation and obtain witness statements.

The Secretary may conduct its own investigation if the complainant makes a prima facie showing that an adverse action was taken in response to a protected whistleblower activity. If the Secretary concludes there is a reasonable possibility that retaliation occurred, he or she must issue written findings and a preliminary order requiring the alleged violator to remedy the violation. This may include reinstatement of a fired employee, restoring the previous terms and conditions of employment or providing compensatory damages.

The parties have 30 days after issuance of the preliminary order to file objections and request a hearing before an administrative law judge. If a hearing is not requested, the preliminary order becomes final.

Significantly, where the Secretary determines that a violation has occurred, he or she may charge the alleged violator with all fees associated with bringing the complaint, including attorneys fees and expert witness fees. A party may appeal the Secretary's final order to the United States Court of Appeals for the circuit where the violation allegedly occurred.

The interim rule became effective on February 27, 2013. Comments can still be submitted to OSHA by April 23, 2013, after which hearings on a final rule will be held.

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