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Whistleblower Protection In The New Food Safety Bill

Law360, New York (December 2, 2010) -- On Nov. 30, the U.S. Senate passed S. 510, the FDA Food Safety Modernization Act, which imposes stricter food safety standards and grants the U.S. Food and Drug Administration greater authority to regulate tainted food. The FMSA was prompted in part by numerous instances of fatal food contamination that revealed insufficient regulation and oversight of food production, including outbreaks of contaminated peanuts, eggs and produce. The Centers for Disease Control and Prevention estimate that there are 76 million cases of foodborne disease each year in the United States, 5,000 of which result in death.

To ensure that workers can disclose food safety concerns without fear of reprisal, Congress included in the FSMA a robust whistleblower protection provision (Section 402) that protects workers engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food. The bill must be reconciled with a House version of the bill, H.R. 2749, which passed on July 30, 2009, and final passage is expected to occur by the end of the year.

Covered Employees

Section 402 applies to any entity “engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food.”

Broad Scope of Protected Conduct

The FSMA prohibits retaliation against an employee who has:

"(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 this act or any order, rule, regulation, standard, or ban under this act, or any order, rule, regulation, standard, or ban under this 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."

A Section 402 complainant need not demonstrate that she disclosed an actual violation of a food safety law or regulation. Instead, Section 402 employs a “reasonable belief” standard that the U.S. Department of Labor and federal courts have construed as protecting a reasonable but mistaken belief that an employer may have violated a particular law. See Van Asdale v. Int’l Game Tech., 577 F.3d 989, 1001 (9th Cir. 2009) (“to encourage disclosure, Congress chose statutory language which ensures that an employee’s reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected.”) (internal quotation, citation omitted); Allen v. Admin. Review Bd., 514 F. 3d 468, 477 (5th Cir. 2008) (applying “reasonable belief” standard in a Sarbanes-Oxley

whistleblower retaliation action); Kalkunte v. DVI Fin. Svcs., Inc., ARB Nos. 05-139 & 05-140, 2004-SOX-056 (ARB Feb. 27, 2009) (clarifying that a reasonable but mistaken belief is protected under SOX). The reasonable belief standard consists of both a subjective and objective component, and objective reasonableness "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." Allen, 514 F.3d at 477.

The "duty speech" doctrine will not apply to FSMA retaliation claims, as the text specifically protects disclosures made "in the ordinary course of the employee's duties."
Some examples of protected conduct include the following:

• reporting that imported cheese is being stored at the wrong temperature and is therefore susceptible to spoiling or containing harmful bacteria;

• reporting that an additive harmful only to infants was added to infant formula;

• reporting that bread is being stored in a facility infested with flies and rodents;

• reporting that a peanut butter manufacturer did not recall peanut butter it knew might have been made using a batch of contaminated peanuts; and

• reporting that a chemical used to lubricate sorting machines has contaminated dietary supplements.

Broad Scope of Prohibited Retaliation

An employer is prohibited from discharging or "in any manner discriminat[ing] against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment." The DOL's Administrative Review Board applies the Burlington Northern standard to analogous whistleblower protection statutes, and therefore Section 402 will prohibit not only tangible adverse actions, but also any action that may dissuade a reasonable employee from engaging in further protected activity. See Melton v. Yellow Transp. Inc., ARB No. 06-052, 05-140, ALJ No. 2005-STA-002 (ARB Sept. 30, 2008) (holding that the Burlington Northern standard applies to whistleblower retaliation claims before the DOL). Prohibited acts of retaliation will likely include termination, suspension, demotion, reduction in pay, failure to promote, failure to hire, diminution in job duties and blacklisting.

Employee-Favorable Causation Standard and Burden of Proof

A complainant can prevail merely by showing by a preponderance of the evidence that her protected activity was a contributing factor in the unfavorable action. A contributing factor is any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. See Klopfenstein v. PPC Flow Techs. Holdings, Inc., ARB No. 04-149 at 18, ALJ No. 2004-SOX-11 (ARB May 31, 2006) (internal citation omitted). Once a complainant meets her burden by a preponderance of the evidence, the employer can avoid liability only if it proves by clear and convincing evidence that it would have taken the same action in the absence of the employee's protected conduct. Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." See Peck v. Safe Air Int'l, Inc., ARB No. 02-028 at 9, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

Remedies

Remedies include injunctive relief, reinstatement, back pay with interest, "special damages," attorneys' fees, litigation costs and expert witness fees. Where reinstatement is unavailable or impractical, front pay may be awarded. "Special damages" has been construed under similar whistleblower protection statutes to include damages for pain, suffering, mental anguish and an injured career or reputation. See, e.g., Kalkunte, ARB Nos. 05-139 & 05-140 at 15 (SOX case awarding complainant emotional distress damages); Hannah v. WCI Communities, 348 F. Supp. 2d 1332, 1334 (S.D. Fla. 2004) ("a successful Sarbanes-Oxley Act plaintiff cannot be made whole without being compensated for damages for reputational injury that diminished plaintiff's

future earning capacity"). A complainant may also be entitled to damages for loss to his reputation as part of the "make whole" remedy provided by the statute. See Hannah, 348 F. Supp. 2d at 1334.

Procedures Governing Section 402 Claims

A complainant must file her complaint with the Occupational Safety and Health Administration within 180 days of the date on which the retaliatory adverse action occurred. OSHA will investigate the claim and can order preliminary relief, including reinstatement. Either party can appeal OSHA's determination by requesting a de novo hearing before a DOL administrative law judge, but objecting to an order of preliminary relief will not stay the order of reinstatement. Discovery before an ALJ typically proceeds at a faster pace than discovery in state or federal court, and the hearings are less formal than federal court trials. For example, ALJs are not required to apply the Federal Rules of Evidence. Either party can appeal an ALJ's decision to the ARB and can appeal an ARB decision to the circuit court of appeals in which the adverse action took place.

If the secretary of Labor fails to issue a final decision within 210 days of the filing of a complaint, or within 90 days after receiving a written determination from OSHA, the complainant can remove her claim to federal court for de novo review and either party may request a trial by jury. Section 402 does not preempt or diminish any other remedy for retaliation provided by federal or state law, and therefore a Section 402 complainant could remove the claim to federal court and add additional claims, such as a common law wrongful discharge action, which would provide an opportunity to obtain punitive damages.

In sum, Section 402 of the FSMA provides strong protection for whistleblowers who disclose food safety violations, thereby ensuring that the public is protected from foodborne disease.

--By Jason M. Zuckerman (pictured) and R. Scott Oswald, The Employment Law Group PC

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