That's Tainted! What Employers Should Know About OSHA's Enforcement of the Food Safety Modernization Act

Insights
8.15.16

Lost in all the landscape-altering changes made by OSHA during the last 18 months was its adoption of enforcement procedures for handling retaliation claims under the FDA's Food Safety Modernization Act ("FSMA"). Employers across many industries should take notice of the far-reaching provisions of the FSMA. It not only applies to food processing employers, but any entity that is involved with the transportation or handling of food products, including trucking companies, distribution centers, warehouses, and cold storage.

Enacted in 2011, the FSMA prohibits an employer from terminating or discriminating against an employee for, among other things, raising a concern about food safety or refusing to comply with an employer's order to violate a law or ordinance regarding food preservation. The FSMA is one of twenty-two (22) whistleblower statutes enforced by OSHA, and the most recent law for which whistleblower procedures were implemented. OSHA adopted the final rule setting forth its enforcement procedures under the FSMA on April 18, 2016.

Here's what employers should know about the FSMA:

1. Which Employers are Subject to the FSMA? The FSMA applies to any entity "engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food."

2. What Employer Actions are Prohibited? The FSMA prohibits employers from discharging or otherwise discriminating against an employee because the employee, "whether at the employee's initiative or in the ordinary course of the employee's duties (or any other person acting pursuant to a request of the employee)" does any of the following:

a. Reports, or is about to report, any violation of a food safety rule, regulation, standard, or order;
b. Testified or is about testify in a proceeding regarding such a violation;
c. Assisted or participated or is about to assist or participate in such a proceeding; or
d. 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 the FSMA, or any order, rule, regulation, standard, or ban.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

3. When and How Claims Must be Filed. Claims under the FSMA must be filed within 180 days of the alleged retaliation. A claim may be submitted either orally or in writing. With the consent of the employee, complaints may be filed by any person on the employee's behalf.

4. OSHA's Enforcement Procedure. Upon receipt of the complaint, the Secretary of Labor must provide written notice to the employer alleged to have violated the FSMA of the filing of the complaint, 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, afford the complainant and respondent an opportunity to respond.

5. Standard for Enforcement. The Secretary should continue the investigation only if the complainant has made a *prima facie* showing that the protected activity was a contributing factor in the adverse action alleged in the complaint and the respondent, in its response, has not demonstrated, through clear and convincing evidence, that it would have taken the same adverse action in the absence of that activity.

6. What Can OSHA do if Liability is Found? If, as a result of the investigation, the Secretary finds there is reasonable cause to believe that retaliation has occurred, the Secretary must notify the respondent of those findings, along with a preliminary order that requires the respondent to, where appropriate: take affirmative action to abate the violation; reinstate the complainant to his or her former position together with the compensation of that position (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and provide compensatory damages to the complainant, as well as all costs and expenses (including attorney fees and expert witness fees) reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

7. Objections to OSHA's Findings. The complainant and the respondent then have 30 days after the date of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing before an administrative law judge (ALJ) at the Department of Labor. The filing of objections under FSMA will stay any remedy in the preliminary order except for preliminary reinstatement. If a hearing before an ALJ is not requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

8. Hearings under the FSMA. If a hearing is held, the statute requires that it be conducted "expeditiously." An order must be entered by the Secretary within 120 days after the conclusion of any hearing, which may provide appropriate relief or deny the complaint. Until the final order is issued, the Secretary, the complainant, and the respondent may enter into a settlement agreement that terminates the proceeding. Where the Secretary has determined that a violation has occurred, the Secretary, where appropriate, will assess against the respondent a sum equal to the total amount of all costs and expenses, including attorney and expert witness fees, reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the Secretary

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

issued the order. The Secretary also may award a prevailing employer reasonable attorney fees, not exceeding $1,000, if the Secretary finds that the complaint is frivolous or has been brought in bad faith. Additional appeal rights to the United States Courts of Appeals are available following the issuance of a final order.

OSHA enforcement is much broader than its fundamental mission of keeping workers safe. Employers should recognize that they cannot retaliate against employees who either raise concerns relating to the food products the employer processes, distributes, or handles, *or* identify issues about workplace safety hazards.

Now is the time to implement procedures for handling complaints made by employees relating to food safety. Make sure any such complaints are taken seriously and fully investigated, with the results documented in writing. Do not terminate or discriminate against any employee who raises such an issue. Taking these steps will help avoid a retaliation claim under the FSMA.

Related People

Travis W. Vance
Regional Managing Partner
704.778.4164
Email

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.