



Auto Industry Faced With New OSHA Retaliation Rule

Insights

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On December 14, 2016, the Occupational Safety and Health Administration (OSHA) published its final rule establishing procedures and time frames for handling automotive industry employees' whistleblower retaliation complaints under MAP-21 (the Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. 30171). The final rule, which became effective immediately, is identical to the interim final rule that was published on March 16, 2016.

Because the rule has broad implications for the industry, affected employers should immediately take the time to familiarize themselves with it and take any steps necessary to ensure compliance.

Scope Of New Rule

The rule applies to motor vehicle manufacturers, part suppliers, and dealerships. The devil is in the details when it comes to this new rule, so it is important to understand what this sentence means. "Manufacturers" include any person who manufactures or assembles motor vehicles or motor vehicle equipment, or who imports motor vehicles or motor vehicle equipment for resale.

- "Motor vehicles" are defined as vehicles driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways (vehicles operated only on rails are not included).
- "Motor vehicle equipment" is broadly defined, and includes any system, part, or component of a motor vehicle as originally manufactured, as well as any similar part or component manufactured or sold for replacement or improvement of a system, part, or component, or as an accessory or addition to a motor vehicle. The definition of equipment also includes "any device or article of apparel" (including motorcycle helmets, but excluding prescription medicine or eyeglasses) that is not a system, part, or component of a motor vehicle, if the device or article is manufactured, sold, delivered, or offered for sale or use on public streets, roads, and highways with the apparent purpose of protecting motor vehicle users from the risk of accident, injury, or death.

The new rule protects automotive industry employees from retaliation, such as threats, reduced hours, intimidation, blacklisting, and termination, for "whistleblowing." This includes employees who, among other things, provide or are about to provide to the employer or the Secretary of Transportation information relating to a motor vehicle defect or a violation of federal safety

standards.

It also protects employees who participate in proceedings arising from alleged violations, and those who refuse to participate in unlawful activity pertaining to vehicle defects or safety standards. The rule prohibits retaliation by any “person,” which includes individuals, partnerships, companies, corporations, associations, trusts, estates, cooperative organizations, and any other entity named in an employee’s complaint. This means individual supervisors, managers, executives, etc. can be personally named in a complaint.

Administrative Procedures

Under the new rule, employees have 180 days to file a complaint with OSHA following the time of the alleged retaliation. OSHA must notify the respondent (i.e., the company, individual, or other “person” named in the complaint) that the complaint has been filed, and of the allegations and the substance of any supporting evidence. The respondent then has 20 days in which to submit a written response and request a meeting to discuss the allegations with OSHA.

Standard For Building Retaliation Case

The complaint will be dismissed unless the complainant makes a prima facie showing that protected activity was “a contributing factor” in the alleged adverse (“retaliatory”) action. This requires the complainant to show that: (1) the employee engaged in a protected activity; (2) the employer knew “or suspected” the employee engaged in the activity; (3) the employee suffered an adverse action; and (4) “the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.”

If the complainant clears this minimal threshold, OSHA will begin an investigation unless the employer can show “by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant’s protected activity.”

OSHA Takes The Next Steps

If, at the conclusion of this phase, OSHA has reasonable cause to believe the respondent violated MAP-21, OSHA will notify the respondent (with a copy to the complainant) of the substance of the evidence supporting the complaint. The respondent then has 10 business days in which to submit a written response, meet with the investigator, and present witness statements and legal and factual arguments.

OSHA must complete all of the above actions within 60 days after the complaint is filed. Also within that 60 day period, OSHA must issue written findings as to whether there is reasonable cause to believe the respondent violated MAP-21. If OSHA concludes there is reasonable cause, the findings must be accompanied by a preliminary order providing relief to the complainant (e.g., reinstatement, back pay, attorneys’ fees, etc.). If OSHA finds no reasonable cause, it will issue a notice to that effect.

Administrative Law Judge May Become Involved

The findings and any preliminary order become effective after 30 days, unless a party files objections or requests a hearing before an administrative law judge (ALJ). In all cases, however, if reinstatement was ordered, that relief is effective immediately and remains so unless and until an ALJ issues a decision lifting it.

The ALJ's *de novo* hearing, on the record, will be commenced "expeditiously." The ALJ will issue a written decision, with findings, conclusions, and an order. The ALJ may find that a violation occurred only if the complainant demonstrates "by a preponderance of the evidence that protected activity was a contributing factor" in the alleged adverse action, and the respondent fails to demonstrate "by clear and convincing evidence" that it would have taken the same action in the absence of any protected activity.

If the ALJ determines that the respondent did not violate the law, the judge will issue an order denying the complaint. If, upon the respondent's request, the ALJ determines that the complaint was frivolous or was brought in bad faith, the judge may award respondent "a reasonable attorney fee, not exceeding \$1,000" (yes, you read that correctly: \$1,000).

Final Administrative Step: Review Board

If the ALJ orders reinstatement or lifts a reinstatement order, that part of the order becomes effective immediately. The rest of the ALJ's order becomes effective after 14 days, unless a party files a petition for review with the U.S. Department of Labor Administrative Review Board (ARB) within those 14 days. If no petition is filed within 14 days, the ALJ's order becomes the final order. If a petition is filed, the ALJ's decision will become the final order unless the ARB issues an order accepting the case for review within 30 days after the petition was filed.

If the ARB accepts the case for review, the ALJ's order will be stayed (except for any order of reinstatement) pending the ARB's decision. The ARB must issue a decision within 120 days following the ALJ's decision (unless a motion for reconsideration by the ALJ was filed in the interim). If the ARB concludes that the respondent violated the law, an order providing relief will be issued. If the ARB concludes that the respondent did not violate the law, an order will be issued denying the complaint. If, upon the respondent's request, the ARB determines that the complaint was frivolous or was brought in bad faith, the ARB may award respondent "a reasonable attorney fee, not exceeding \$1,000."

Significantly, the rules allow the ALJ or ARB to waive rules and issue orders "in special circumstances not contemplated by these rules, or for good cause shown" Additionally, there are several opportunities for settlement throughout the process. Unfortunately, they all require the parties to submit the proposed settlement agreement to OSHA for review and approval.

Court Action

If the Secretary of Labor has not issued a final decision within 210 days after the complaint was filed, and there was no delay due to the complainant's bad faith, the complainant may bring an action in

and there was no delay due to the complainant's bad faith, the complainant may bring an action in law or equity for *de novo* review in the appropriate federal district court. The court will have jurisdiction regardless of the amount in controversy, and either party may demand trial by jury. The same burdens of proof will apply in court as would apply in the administrative proceedings.

Any person adversely affected by a final decision of an ALJ or the ARB, such as the case may be, may file a petition for review in the federal court of appeals for the circuit in which the violation allegedly occurred, or in the circuit in which the complainant resided on the date of the alleged violation. If any person fails to comply with a preliminary order of reinstatement or a final order (including an order approving a settlement agreement), the Secretary of Labor or a person on whose behalf the order was issued may file a civil action seeking enforcement in the federal district court for the district in which the violation allegedly occurred.

Conclusion

Needless to say, this new rule stacks the deck against automotive industry employers. This is no accident. OSHA intended the rule to encourage automotive industry employees to report perceived vehicle defects and safety violations, and to put the fear of God in anyone who might consider retaliating against a whistleblower.

For businesses that fit into the broad category of covered employers and have not already taken appropriate steps to ensure compliance with MAP-21, now is the time to act. Covered employers who do not already have a policy prohibiting retaliation for this type of protected activity should adopt one. It's also time to make sure everyone from the first line supervisor to the CEO understands these rules and understands that OSHA will not tolerate whistleblower retaliation.

If you have any questions about this proposed rule or how it may affect your business, please contact the author at GAdams@fisherphillips.com or 502.561.3975, your Fisher Phillips attorney, or any member of our [Automotive Manufacturing Practice Group](#) or [Workplace Safety and Catastrophe Management Practice Group](#).

This Legal Alert provides an overview of a finalized new federal regulation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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