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OSHA Continues to Turn Up the Volume on Whistleblowing

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Rushing to put final rules in place before the current Administration's term ends, on March 17, 2016, the Occupational Safety and Health Administration (OSHA) published its final rule for implementing the whistleblower protections under Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010 (CFPA). The day before, OSHA published its interim final rule and request for comments on its proposed procedures for handling whistleblower retaliation complaints under Section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21), applicable to automotive industry manufacturers, suppliers and dealers. Both sets of rules establish procedures and timeframes for OSHA's handling of whistleblower retaliation complaints under each statute, as well as identify the available legal and equitable remedies for whistleblowers who prevail.

Consumer Financial Protection Act of 2010

OSHA's final rule for its handling of whistleblower retaliation complaints under the CFPA is, in most respects, the same as OSHA's final rule for its handling of Sarbanes-Oxley Act (SOX) complaints. For instance, apart from differences in the deadlines for seeking de novo review in U.S. district court, both final rules provide the same deadlines and procedures for OSHA's administrative adjudication of whistleblower retaliation complaints.

But, the statutory coverage and protected activity definitions contained in the final rules are very different. Many employers and legal practitioners get this confused, especially since Congress enacted the CFPA on July 21, 2010 as part of Dodd-Frank. But, CFPA's whistleblower protections contained in Section 1057 are distinct and independent from those contained in SOX and Dodd-Frank.

For example, the CFPA whistleblower protections apply to companies and their affiliates—whether publicly traded or not—that are engaged in selling a “consumer financial product or service.” This includes a wide variety of

financial products and services commonly sold to individual consumers for personal, family or household purposes. Thus, the types of companies the CFPA covers include credit unions that extend consumer credit, and provide residential mortgages, loans (such as student loans), lease financing, and check cashing and collection services. Other types of covered companies include those that provide real estate settlement or appraisal services, debt collection services, foreclosure relief, consumer reporting, payday loans, and financial advice and products—such as independent wealth management firms.

In addition, “protected activity” under the CFPA is defined differently from “protected activity” under SOX and Dodd-Frank. First, a “covered” whistleblower under the CFPA must be an individual “performing tasks related to the offering or provision of a consumer financial product or service.” Second, for this employee to be protected, the type of information the employee reports must concern a violation of (1) Title X of Dodd-Frank (pertaining to the CFPA); OR (2) any provision of law “subject to the jurisdiction of the Consumer Financial Protection Bureau (“Bureau”), which oversees more than a dozen federal consumer financial laws, as well as regulations issued by seven “transferor agencies,” including the Board of Governors of the Federal Reserve System, the FDIC, the FTC, the Office of the Comptroller of the Currency, HUD and others; OR (3) any rule, order or standard “prescribed by the Bureau.”

Finally, to engage in “protected activity,” the employee must have provided such information to “the employer, the Bureau, or any other federal, state or local governmental authority”; OR, testified in a proceeding identified in the CFPA; OR, filed a legal action under any federal consumer financial law; OR, “objected to or refused to participate in any activity, policy, practice, or assigned task that the employee... reasonably believed to be in violation of any law, rule, order, standard, or prohibition” subject to the Bureau’s jurisdiction.

Thus, as you can see, the type of employers the CFPA covers, and the type of whistleblower activity it protects, is much different from the SEC-oriented and anti-shareholder-fraud protections for whistleblowers under SOX and Dodd-Frank.

Moving Ahead for Progress in the 21st Century Act

Section 31307 of MAP-21, enacted July 6, 2012, contains a whistleblower protection provision for workers in automobile manufacturing, parts suppliers, and car dealerships who have been discharged or otherwise retaliated against for providing information concerning motor vehicle defects or violations of motor vehicle safety standards to their employer or the Secretary of Transportation. Chapter 301 of Title 49 of the U.S. Code (Chapter 301) gives the National Highway Traffic Safety Administration (NHTSA) the authority to issue vehicle safety standards and to require manufacturers to recall vehicles that have a safety-related defect or that do not meet federal safety standards. It also contains other reporting and notification requirements for motor vehicle manufacturers and part suppliers. Employees of manufacturers, part suppliers, and dealerships are now protected when they report these issues within 180 days of an adverse employment action.

The Act provides that the Secretary may conduct an investigation only if the complaint has made a prima facie showing that the protected activity was a contributing factor in the adverse action alleged in the complaint. Following its statement of policy in the memorandum titled [*Clarification of the Investigative Standard for OSHA Whistleblower Investigations*](#), and notwithstanding the Supreme Court’s 2013 decision in *University of Texas Southwestern Medical Center v. Nassar* (requiring strict “but-for” causation for retaliation claims), OSHA’s rules provide that a claimant need only show that “reasonable cause to believe that retaliation has occurred” for the agency to move forward with a cause finding. 29 C.F.R. § 1988.105. This will result in an obligation for the Department of Labor Solicitor’s Office to represent the claimant in a hearing before the DOL Office of Administrative Law Judges. The employer can still prevail by demonstrating

through clear and convincing evidence that it would have taken the same adverse action in the absence of that activity, but instead of considering that during the inspection, OSHA will force the employer to a trial.

The interim final rule was effective as of the date of its publication, March 16, 2016. OSHA did, however, invite comments on:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- Enhancing the quality, utility, and clarity of the information collected; and
- Minimizing the burden on employees who must comply; for example, by using automated or other technological information collection and transmission techniques.

Although not specifically requested, Employers can comment on other items such as the improper attempt to change the burden of proof. Employers may submit comments electronically at <http://www.regulations.gov>, the Federal eRulemaking Portal. Comments can also be submitted by mail or facsimile; for details, see the [Federal Register notice](#). The deadline for comments is May 16, 2016.

Conclusion

These regulations continue OSHA's pattern of handling whistleblower and retaliation complaints in similar manners and in accord with the Agency's disregard of statutory language to force the cost of an evidentiary hearing on employers where less than 50% of the evidence supports the claimant.