



# COMPLIANCE OVERVIEW

Provided by Gallagher Risk Management - Tulsa

## Procedures for Food Safety Whistleblower Retaliation Claims

On April 18, 2016, the Occupational Safety and Health Administration (OSHA) issued a final rule establishing the procedures for handling whistleblower retaliation complaints under the the Federal Food, Drug, and Cosmetic Act (FD&C Act). The final rule became effective immediately.

The FD&C Act applies to all employers in the food industry, including those involved in manufacturing, processing, packing, transporting, distributing, receiving, holding or importing food items. Under a 2011 amendment made by the Food Safety Modernization Act (FSMA), the FD&C Act prohibits these employers from retaliating against employees who disclose possible violations of food safety laws.

OSHA's final rule sets forth the time frames and processes that apply when an employee believes his or her employer took an adverse action against him or her based on a protected activity.

### HIGHLIGHTS

#### RETALIATION CLAIM PROCEDURES

- Employees may file a complaint within 180 days of an employer's adverse action.
- Employers have 20 days to respond to a complaint.
- OSHA will dismiss a complaint if a protected activity was not a contributing factor or if there was no retaliation.
- If the complaint is not dismissed, OSHA will issue written findings within 60 days after the complaint was filed.

#### LINKS AND RESOURCES

- OSHA's [final rule](#) on procedures for handling retaliation complaints under the employee protection provision of the FD&C Act
- OSHA's [website](#) regarding its whistleblower protection programs

## BACKGROUND

The FSMA added Section 1012 to the FD&C Act, which protects whistleblowers in the food industry by prohibiting their employers from retaliating against them. Employer actions that may constitute retaliation include demoting, discharging, suspending, threatening, harassing, reprimanding or discriminating against a whistleblower employee.

In 2014, OSHA issued an interim final rule to establish the procedures for handling whistleblower complaints of retaliation. The more recent, final rule, which became effective on **April 18, 2016**, replaced the interim final rule without making any significant changes. The procedures in the rule are similar to those that apply for retaliation complaints under several of the other laws that OSHA administers.

## EMPLOYEE RIGHTS

Using the procedures outlined in OSHA's final rule does not keep employees from pursuing other remedies from an employer for adverse actions. Employees who file retaliation complaints can also use other available safeguards against impermissible discrimination or retaliation.

In addition, the final rule and the FD&C Act do not affect any employee's rights, privileges or remedies under any federal or state law or under a collective bargaining agreement. Employees and employers may not agree to waive the rights and remedies provided by the FD&C Act through any agreement, policy, form or condition of employment.

## WHISTLEBLOWER RETALIATION COMPLAINT PROCEDURES

OSHA's final rule establishes the following procedures and time frames for complaints of retaliation under section 1012 of the FD&C Act.

### *Employee Complaint*

Under the final rule, an employee may file a retaliation complaint **within 180 days** after an employer takes an adverse action. No particular form of complaint is required. However, OSHA will not investigate a complaint unless the employee can show that:

- He or she engaged in protected activity (or was perceived to have done so);
- The employer knew or suspected that he or she engaged in the protected activity;
- He or she suffered an adverse action; and
- His or her protected activity was a contributing factor in the adverse action.

After receiving a complaint that includes the required allegations, OSHA will notify the affected employer and provide information about the employer's rights. OSHA will also provide the employer with a copy of the complaint after it removes any confidential information from the original.

## ***OSHA Investigation***

Within **20 days** after receiving a copy of an employee's complaint from OSHA, the employer may submit a written statement and any affidavits or documents related to the issues presented in the employee's complaint. The employer may also request a meeting with OSHA to present witness statements and any other evidence or arguments.

If the employer can show, **by clear and convincing evidence**, that it would have taken the same adverse action if the employee had not engaged in the protected activity, OSHA will discontinue its investigation and dismiss the claim.

Otherwise, OSHA will continue investigating, and, if it has reasonable cause to believe the employer violated the FD&C Act's employee protection provisions and that the employee should be reinstated, it will contact the employer to discuss the evidence that supports the employee's allegations. The employer will then have **10 days** after OSHA's contact to submit any additional information or arguments.

## ***Written Findings***

Starting on the date an employee files a complaint, OSHA has **60 days** to issue written findings as to whether the employer violated the FD&C Act's employee protection provision. If OSHA concludes that there is reasonable cause to believe a violation occurred, it may also issue a preliminary order giving relief to the employee. This relief may include:

- A requirement that the employer take affirmative action to abate the violation;
- Reinstatement of the employee with the same seniority and benefits;
- Payment of backpay with interest to the employee; and
- Payment of compensatory damages, including special damages, expert witness fees and reasonable attorney's fees, to the employee.

A preliminary order that requires reinstatement is effective immediately upon the employer's receipt of the order. Other portions of a preliminary order become final on the later of either 30 days after the employer received the order or the date for compliance set forth in the order, unless a party files an objection and a request for a hearing within **30 days** after receiving the order.

If an employee wishes to withdraw a complaint after OSHA issues its written findings and preliminary order, he or she must do so before any objections and hearing requests are filed, and OSHA will

determine whether to approve the withdrawal. If a complaint is withdrawn because the parties settled the dispute, the parties must also submit the settlement agreement for OSHA's approval.

## ***Hearings and Review***

Once a party files an objection to OSHA's findings and preliminary order within the **30-day** period that follows the date on the order, all provisions of the order, except for any portion requiring preliminary reinstatement, are placed on hold. OSHA will also schedule a hearing before an administrative law judge (ALJ).

ALJs conduct hearings and issue new decisions without deferring to OSHA's original findings. An ALJ's decision and order is effective **14 days** after the ALJ issues it, unless either party requests review by the Administrative Review Board (ARB) within that period. However, any portion of an ALJ's order that requires reinstatement or that lifts an order of reinstatement is effective immediately.

After a petition for ARB review is filed, the ARB will decide whether to accept the case. If the ARB does not accept the case within 30 days after the petition filing date, the ALJ's order becomes final. If the ARB does accept a case within the 30-day period, the ALJ's decision, other than any portion requiring reinstatement, will not take effect. The ARB will issue a final decision on an accepted case within **120 days** after the ALJ's hearing in the case concluded.

A party who is adversely affected or aggrieved by an ARB decision may obtain additional review by filing suit in the U.S. Court of Appeals within **60 days** after the date of the ARB's order.