Whistleblower Litigation
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The Secretary is supposed to issue written findings, including ordering any appropriate relief, no later than 60 days after the complaint is filed. 15 U.S.C.A. § 2087(b)(2)(A). Parties have 30 days after "notification of findings" to object to the determination and request a hearing on the record. Id. Reinstatement is not stayed pending the hearing. Id. A final order must issue within 120 days of the hearing. 15 U.S.C.A. § 2087(b)(3)(A). A party may petition for review of a final agency order in the U.S. Court of Appeals in the circuit where the violation occurred or where the complainant resided on the date of the violation. 15 U.S.C.A. § (b)(5)(A).

If the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after issuing a written determination, the complainant may bring an action for *de novo* review in the U.S. District Court with jurisdiction over the action. 15 U.S.C.A. § 2087(b)(4). The Act appears to give the Secretary of Labor up to 300 days to issue a final decision: if the Secretary of Labor issues the written determination on day 210, then the Act provides for another 90 days to make a final decision. The Act expressly provides a right to a jury trial at the request of either party. Id.

G. Available Remedies

Under the Act, the Secretary of Labor is directed to provide a broad range of remedies in successful cases, including: affirmative action to abate the violation, reinstatement of the complainant to his or her former position with back pay, and compensatory damages. 15 U.S.C.A. § 2087(b)(3)(B)(i)-(iii). Notably, the Act requires, at the request of the complainant, the Secretary of Labor to assess against the opposing party the aggregate amount of all reasonably incurred costs and expenses, including attorneys' and expert witness fees. 15 U.S.C.A. § 2087(b)(3)(B)(iii).

If the complainant brings an action in District Court because the Secretary of Labor has failed to issue a final decision within the statutorily required time, the Act allows the district court to grant all relief necessary to make the employee whole, including: reinstatement, back pay with interest, compensatory relief, injunctive relief, and "compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." 15 U.S.C.A. § 2087(b)(4).

IV. FDA FOOD SAFETY MODERNIZATION ACT WHISTLEBLOWER PROTECTIONS

A. Introduction

In response to recent high-profile outbreaks of foodborne illnesses and nationwide food recalls, Congress passed the FDA Food Safety Modernization Act ("FSMA"), Pub. L. No. 111-353, 124 Stat. 3885, which expands the regulatory authority of the FDA and provides sweeping amendments to the Federal Food, Drug, and Cosmetic Act ("FDC"), 21 U.S.C. § 301. Signed

into law by President Obama on January 4, 2011, the FSMA is designed to implement preventative process controls to enhance the food-safety system and hold the food industry accountable for preventing contamination. Section 402 of the FSMA, which became effective immediately upon signing, establishes robust whistleblower protections for employees in the food-service industry who play a front-line position in protecting the integrity of the nation's food supply.

B. Covered Employers and Employees

The whistleblower protections created by Section 402 broadly apply to employees of any entity engaged in "the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food." §402(a). Thus, Section 402 protects employees at multiple points along the food-supply chain—such as a truck driver transporting food or an assembly line worker at a processing plant—who speak out against violations of food safety laws enforced by the FDA.

C. Protected Activity

Under Section 402, an employer may not retaliate against an employee who: (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 the employee reasonably believes to be a violation of the FDC or any order, rule, regulation, standard, or ban under the FDC; (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 "reasonably believed" to be in violation of the FDC, or any order, rule, regulation, standard, or ban under the FDC. §402(a)(1)-(4).

It is important to note that the whistleblower protections under Section 402 only extend to disclosures of violations of food-safety regulations enforced by the FDA. The language of Section 402 does not cover violations of food-safety regulations enforced by the USDA, which generally cover the meat and poultry industries. Food-safety regulations enforced by the FDA cover nearly all other food products, such as fruits, vegetables, nuts and grains.

D. Prohibited Retaliation

Covered employers are prohibited from discharging or "otherwise discriminat[ing] against an employee with respect to compensation, terms, conditions, or privileges of employment" in retaliation for the employee engaging in protected activity. Pub. L. No. 111-353, §402(a). Notably, Section 402 explicitly provides whistleblower protection regardless of

whether the protected activity occurs at the employee's initiative or in the ordinary course of the employee's duties. Id.

E. The Litigation Process

The Secretary of Labor is tasked with enforcing the whistleblower protections under Section 402, which includes the adjudication of whistleblower complaints filed with the Department of Labor. An employee alleging retaliation for engaging in protected activity under the FSMA must file a complaint with the Secretary no later than 180 days after the date on which the violation occurred. §402(b)(1). The complaint must identify the person responsible for the retaliation. Id.

After the complaint has been filed, the Secretary will initiate an investigation if it determines that the employee has made a *prima facie* case showing that his or her protected activity was "a contributing factor" in the unfavorable employment action alleged in the complaint, and that the employer has failed to rebut the claim by clear and convincing evidence. §402(b)(2)(C)(i)-(iv). Otherwise, the Secretary will dismiss the complaint without an investigation. Id.

If the complaint survives dismissal, the Secretary is to initiate an investigation no later than 60 days after the complaint has been filed. §402(2)(a). The Secretary will only find reasonable cause that a Section 402 violation has occurred if the employee demonstrates that her protected activity was "a contributing factor" in the unfavorable employment action. §402(b)(2)(C)(i). The employer can avoid liability only by demonstrating by clear and convincing evidence that it would have taken the unfavorable employment action in the absence of the employee's protected activity. §402(b) (2)(C)(iv).

The Secretary is to issue a written determination of its findings, including ordering any appropriate relief, no later than 60 days after the complaint is filed. §402(b)(2)(A)-(B). Should the Secretary conclude that the employee's complaint is frivolous or has been brought in bad faith, the Secretary may award the prevailing employer a "reasonable attorneys' fee," not to exceed $1,000. §402(b)(3)(D).

Parties have 30 days after the "notification of findings" to file an objection to the determination and request a hearing on the record. §402(b)(2)(B). The requested hearing is to be "conducted expeditiously," but reinstatement is not stayed pending the hearing. Id. The Secretary must issue a final order within 120 days of the hearing. §402(b)(3)(A). However, any party adversely affected or aggrieved may obtain review of the order in the U.S. Court of Appeals in the circuit where the violation occurred or where the complainant resided on the date of the violation. Pub. L. No. 111-353, §402(b)(5)(A). Unless ordered by the court, the commencement of the review proceedings will not operate as a stay of the final order. Id.

If the Secretary has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after issuing a written determination, the employee may bring an action for *de novo* review in the U.S. District Court with jurisdiction over the action. Pub. L. No. 111-353. §402(b)(4)(A). Section 402 expressly provides a right to a jury trial at the request of either party. Id.

F. Available Remedies

If the Secretary of Labor determines that a violation of Section 402 has occurred, the Secretary is directed to order affirmative action to abate the violation, reinstatement of the employee to his or her former position with back pay, and compensatory damages. Pub. L. No. 111-353, §402(b)(3)(B)(i)-(iii). Notably, Section 402 requires, at the request of the complainant, the Secretary to assess against the opposing party the aggregate amount of all reasonably incurred costs and expenses, including attorneys' and expert witness fees. Pub. L. No. 111-353, §402(b)(3)(C).

If the complainant brings an action in District Court because the Secretary failed to issue a final decision within the statutorily required time, the FSMA allows the District Court to grant all relief necessary to make the employee whole, including: reinstatement, back pay with interest, and "compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees." Pub. L. No. 111-353, §402(b)(4)(B).

V. DEFENSE CONTRACTOR WHISTLEBLOWER PROTECTIONS

The wars in Afghanistan and Iraq have seen unprecedented levels of private defense contractors in prominent military support and reconstruction roles. This burgeoning niche is in addition to the multibillion dollar defense contracting industry already in existence prior to the most recent military operations. The lure of lucrative government contracts, combined with the lives and taxpayer dollars at stake in the performance of those contracts, necessitates whistleblower protections for defense contractors and their employees. This protection is found in 10 U.S.C. § 2409. There is very little case law interpreting the law's provisions.

A. Protected Activity

Under the defense contractor whistleblower law, an employee of a defense contractor is protected for making disclosures to one of several entities of misconduct by his or her employer. To be protected by the act, the employee must reasonably believe that she has information that evidences: (1) "gross mismanagement of a Department of Defense contract or grant;" (2) "a gross waste of Department of Defense funds;" (3) "a substantial and specific danger to public health or safety;" or (4) "a violation of law related to a Department of Defense contract (including the competition for or negotiation of a contract) or grant." 10 U.S.C.A. § 2409(a).