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July 30, 2012

Changes to the regulations implementing the whistleblower provision of the Surface Transportation Assistance Act ("STAA") went into effect July 27, 2012. The Occupational Safety and Health Administration ("OSHA") administers the whistleblower provision of the STAA, along with whistleblower provisions in some twenty other statutes. Consistent with OSHA's continuing efforts to broaden protections to potential whistleblowers, the changes to the STAA whistleblower regulations expand the scope of employee activities that are protected from retaliation, broaden the group of employers and workers that are covered by the statute, ensure that the burden on a worker to show that he or she engaged in a protected activity is relatively low (while the burden on an employer to succeed in its defense remains high), and increase the remedies available to successful complainant-employees.

What employee actions are protected

The new whistleblower regulations provide that an employee is protected from retaliation if he or she:

- files a complaint, or
- participates or plans to participate in a proceeding (or is perceived by his or her employer to have filed or to be about to file a complaint or participate in a proceeding) relating to a violation of a regulation, standard or order pertaining to either the safety or the security of commercial motor vehicles.

An employee is also protected if he or she:

- refuses to operate a vehicle in violation of a regulation, standard, or order related to commercial motor vehicle safety, health or security; or
- refuses to operate a vehicle because he or she has a reasonable apprehension of serious injury to himself or herself or the public because the vehicle is in an unsafe or hazardous security condition;
- accurately reports hours on duty or cooperates in a governmental safety or security investigation.

Broad definition of employee and commercial motor carrier

The new rule includes a broad definition of an "employee" to include

- drivers (including independent contractors when personally operating a commercial motor vehicle);
- mechanics; and
- freight handlers who directly affect either the safety or the security of a commercial motor vehicle in the course of employment by a commercial motor carrier.

The new rule also broadens the definition of "commercial motor carrier" to reach all motor carriers in or affecting commerce.

What an employee must show to state a claim; employer defenses

- An employee-complainant must make an initial showing that his or her protected activity was a contributing factor in the adverse action taken by his or her employer.
- A contributing factor is any factor which, alone or in connection with other facts, tends to affect in any way the outcome of the decision.

- The OSHA investigator may supplement the complaint with interviews of the employee-complainant to make the required showing for the employee.
- The employee can make this showing by, for example, demonstrating that an adverse action was taken against him or her shortly after he or she engaged in protected activity, thereby creating an inference that the activity was a contributing factor to the adverse action.

If the employee fails to make this showing, or if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity, OSHA must discontinue its investigation and dismiss the complaint.

Trial if no agency action

An employee-complainant is entitled to a *de novo* trial in federal district court if no final order issues from OSHA within 210 days from the filing of the Complaint unless the delay is due to the employee-complainant's bad faith.

Expansion of remedies

A successful employee-complainant is eligible for:

- reinstatement to his or her former position with the same pay and terms and privileges of employment;
- compensatory damages including back pay;
- interest on the back pay award;
- special damages including the employee-complainant's litigation costs, expert witness fees and reasonable attorneys' fees; and
- up to $250,000 in punitive damages.

In addition the employer must take affirmative action to abate the violation.

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