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Food Safety and Whistleblowing – New Federal Law May Deliver a Full Basket of Claims

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With virtually no fanfare, a major sector of the American workforce – those who handle food – won whistleblower protections under the FDA Food Safety Modernization Act ("FSMA"), Pub. L. No. 111-353. The Food and Drug Administration ("FDA") describes FSMA, signed into law on January 4, 2011, as improving food safety by preventing hazards "from farm to table" and making "everyone in the global food chain responsible for safety."

While much attention and controversy surrounded the whistleblower bounty awards of the Dodd-Frank Wall Street Reform and Consumer Protection Act enacted in July 2010, the potentially more significant whistleblower provision of FSMA passed in the final days of the 2010 legislative session in routine and undramatic fashion. Indeed, the most significant whistleblower portions of the bill did not emerge until a version of the bill was reported out of a Senate committee in mid-November. (No written report explained the major changes written into the law.) Because of the sheer size of the workforce that touches food and the comprehensive definition of "protected activity," however, the relatively unheralded law extends coverage and companion employer obligations in potentially unprecedented measure. The claims that result could dwarf those arising under whistleblower laws receiving far more media and business attention.

Food Industry Coverage – It Ain't Just Beans

The FSMA whistleblower provision reaches quite broadly. It includes "entities" engaged in such diverse activities as the:

- manufacture,
- processing,
- packing,
- transportation,
- distribution,
- reception,
- holding, or
- importation

of food. The legislative history does not disclose more detail on industries or employers covered by this set of activities.

In terms relatively standard to whistleblower protections, covered employers are prohibited from taking unfavorable personnel actions by way of discharge or other adverse employment actions against an employee with respect to compensation, terms, conditions, or privileges of employment because of an employee's protected activity. However, protected activity includes both internal and external disclosures and activities in its expansive definition. Expressing no priority or preference for the particular types of protected activity it defines, FSMA protects individuals equally if they:

1) provide, or cause to be provided, to the employer, the federal government, or the attorney general of a state information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of the Federal Food, Drug and Cosmetic Act ("FDCA") or any order, rule, regulation, standard, or ban under the FDCA;
2) testify, or are about to testify, in a proceeding concerning such violation;
3) assist or participate, or are about to assist or participate, in such a proceeding; or
4) object to, or refuse to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believes to be in violation of any provision of the FDCA, or any order, rule, regulation, standard, or ban under the FDCA.

Assuring that its base of protection will be further broadened, FSMA provides that protected activity includes not only actions expressly initiated by the employee, but also activities in the ordinary course of the employee's duties or the duties of any person acting pursuant to a request of the employee.

OSHA/DOL Procedures Adopted – FSMA Puts Meat on Familiar Bones

FSMA becomes the 20th statute adopting the familiar procedure of investigation by the Occupational Safety and Health Administration ("OSHA") and litigation through U.S. Department of Labor ("DOL") processes, with access to federal courts by the complaining employee if a final administrative determination does not issue after a specified period. FSMA's procedures borrow substantially from Dodd-Frank's Consumer Financial Protection Act (and resemble those of the Sarbanes-Oxley Act). Some features characteristic of this scheme are:

- A standard of proof favorable to complainants, allowing a prima facie case with a showing that protected activity was a "contributing factor" in the unfavorable personnel action alleged in the complaint.
- A rigorous standard for defending claims that requires employers to demonstrate by "clear and convincing" evidence that the same unfavorable personnel action would have been taken in the absence of the alleged protected activity.

- Controversial – and judicially uncertain – orders for preliminary reinstatement if it is determined at the conclusion of the administrative investigation or after an administrative trial that there is reasonable cause to believe a violation has occurred.
- A requirement that a proceeding may be terminated by settlement between a complainant and an employer before issuance of a final administrative order only if supervised by OSHA/DOL.
- Remedial relief, including affirmative action to abate the violation; reinstatement to the former position; back pay and restoration of the terms, conditions, and privileges associated with employment; compensatory damages to the complainant; costs and expenses (including attorneys' fees and expert witness fees) reasonably incurred by the complainant for, or in connection with, the bringing of the complaint.
- An option for the complainant – but not the employer – to discontinue administrative proceedings and bring an action *de novo* in federal court if a final administrative decision has not issued within 210 days after the filing of the complaint, or within 90 days after a written investigative determination is received. This process allows a complainant dissatisfied with the administrative record or results to start anew with a right to trial by jury and application of the same favorable evidentiary burdens of proof applicable in administrative proceedings.

The following FSMA items distinguish the new federal law from other recent legislation adopting the OSHA/DOL scheme:

- Whistleblower protection under FSMA is denied to an employee who has engaged in wrongdoing by deliberately causing a violation that underlies the protected activity, unless he or she acted at the direction of the employer or its agent.
- FSMA does not bar a waiver of rights and remedies by agreement, policy, form, or condition of employment, nor does it declare that pre-dispute agreements requiring arbitration of whistleblower retaliation claims will be invalid or unenforceable. In this respect, FSMA departs from such recent legislation as the Dodd-Frank amendments to Sarbanes-Oxley and Dodd-Frank's Consumer Financial Protection Act.

FSMA adopts Dodd-Frank's Consumer Financial Protection Act's statute of limitations, requiring the filing of an administrative complaint with OSHA/DOL within 180 days after the date on which a violation is alleged to have occurred.

Implications – Plenty for Employers to Digest

Considering the practicalities of how many businesses and individuals – inside and outside the food industry – have some role in getting food to those who consume it, probably no legislation has swept as broadly as FSMA to confer whistleblower protections. "Whistleblower rights don't get any stronger than this," according to one advocate for the legislation.

Quite apart from creating protection for testifying or participating in proceedings, by enacting FSMA, Congress expanded exponentially the universe of protected individuals by including anyone holding a reasonable belief that a FSMA violation has occurred anywhere in the movement of food, from farm to table, and acting to make an appropriate internal or external disclosure about it, or objecting, refusing to participate in a related activity, policy, or practice – or refusing to perform an assigned task based on that belief. What otherwise could constitute an insubordinate refusal to perform a work assignment may be cloaked by FSMA as protected activity if related to a reasonable, albeit wrong, belief that it was motivated by a FSMA food-safety concern. Moreover, because the protected activity need only be one of possibly several factors *contributing* to an employer's unfavorable personnel action, employees can be expected to erect even casual, otherwise unremarkable and forgotten or unrecorded, workplace remarks or work-related actions, advancing food safety as elements of their newly conferred whistleblower job-protection rights.

The extent to which whistleblower advocates may argue for an exceedingly broad reach – perhaps even to retail establishments like grocery stores or restaurants – cannot be known or foreclosed. Employers that believe they might fit within the coverage should proceed conservatively until the DOL and the courts sort out the precise contours of the statute.

As a cautionary note, we observe that FSMA refers to the FDCA as the basis of whistleblower protection. While the substance of FSMA focuses on businesses handling food, the whistleblower provision's incorporation of, and reference to, the larger statute that comprehends drugs and cosmetics suggests that the scope of FSMA whistleblower coverage may extend beyond food products for FSMA-covered employers. If protected activity were construed to be coextensive with FDA-regulated drugs and cosmetics items, it is possible that individuals could bootstrap to expanded, non-food-related coverage by raising issues concerning drugs and cosmetics and assert entitlement to protection even more broadly than is apparent from the statute's "food safety" label. Rulemaking may clarify whether employers subject to expected FSMA whistleblower protections for disclosures and activities or refusals concerning food will have expanded exposure because they also handle products or have activity with non-food items within the FDA's jurisdiction.

A further challenge exists in FSMA's assignment of responsibility for compliance downstream, potentially to the lowest level of supervision acting on behalf of employers. Employers accustomed to formal channels established by compliance or audit hotlines

will need to rethink their procedures to ensure compliance with FSMA, as any representative may be endowed with authority sufficient to become the recipient of a bona fide employee complaint or a work refusal capable of transformation into statutorily conferred whistleblower protection.

How businesses will receive, record, and process the myriad communications and observations that employees could utilize to show protected activity looms as an enormous challenge. Supervisors and managers, even at the first line of authority, will need to understand their critical role in compliance programs and in properly communicating matters of potential concern through appropriate channels. The new consequences of adverse employment actions that could be linked by an employee to FSMA-protected activity known to supervisors and managers makes it imperative that affected businesses update their compliance and human resources policies and procedures. Training about whistleblowing complaints will need to occur at all levels of management.

What Employers Should Do Now

Probably more than any whistleblower legislation preceding it, FSMA delivers protections and correlative responsibilities affecting a broad range of businesses and their entire workforces. With the enactment of FSMA, it becomes clear that exotic schemes and staggering economics do not provide the only impetus for strong whistleblower protections. FSMA sets whistleblowing more firmly as a fixture across food industry lines, empowering employees to report or act on real or perceived violations of the law. We suggest that employers in the chain of food manufacture, processing, packing, transportation, distribution, reception, holding, or importation take the following actions to protect themselves against potential claims and to best defend themselves against those that may arise:

- Become familiar with the several respects in which FSMA may affect business operations and employee relations.
- Build FSMA compliance into employee orientation and training programs.
- Establish and monitor adherence to procedures for:
    - the reporting of incidents by whistleblowers,
    - the hotline or other receipt of information, and
    - the investigation and determination of compliance and human resources matters.
- Assure that supervisors know their responsibilities as employer representatives to report and respond in a manner consistent with established guidelines.
- Manage the communication of confidential information.

FSMA opens wide a new door to whistleblower activity and protection, necessitating employer attention to related compliance obligations and human resources considerations.

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