An Ounce of Prevention:

Minimizing Affordable Care Act Retaliation Claims

Attorneys must advise businesses covered by the Affordable Care Act how to prevent actions that might constitute retaliation for ACA "protected activities."

BY DANIEL FINERTY

SUMMARY
Many provisions of the Affordable Care Act (ACA) are close to their implementation date of Jan. 1, 2014. The ACA's relatively little-known retaliation provisions are nearly as significant as the much-publicized employer mandates.

Attorneys and their business clients must be aware of the broad definition of "protected activity" and of steps they can take to prevent retaliation claims. Attorneys and clients must be ready to act quickly, given the ACA's short time frames for responding when claims are filed.

In addition to numerous other legislative changes, the Affordable Care Act (ACA) [1] created a new retaliation claim for current employees, former employees, and applicants for employment (generally referred to as employees). Employees can file this retaliation claim with the Occupational Safety and Health Administration (OSHA) and, after exhausting administrative remedies and requesting the right to do so, an employee may proceed in federal court. Section 1558 of the ACA[2] created 29 U.S.C. § 218c, which provides that "[n]o employer shall discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee (or an individual acting at the request of the employee) has" engaged in activity protected by the ACA.

The ACA broadly protects a wide range of activities by employees. An employee engages in *protected activity* under the ACA when the employee does any of the following:

- Receives a tax credit under section 36B of the Internal Revenue Code of 1986;
- Receives a tax subsidy under section 1402 of the ACA;
- Provides or causes to be provided to the employer, the federal government, or a state attorney general information relating to any ACA violation;
- Provides or causes to be provided to the employer, the federal government, or a state attorney general information relating to any act or omission the employee reasonably believes to be a violation of any ACA provision;
- Is about to provide or cause to be provided to the employer, the federal government, or a state attorney general information relating to any ACA violation or any act or omission the employee reasonably believes to be an ACA violation;
- Provides testimony, or is about to provide testimony, concerning an alleged ACA violation;
- Assists or participates in, or is about to assist or participate in, a proceeding regarding an ACA violation or any act or omission the employee reasonably believes to be an ACA violation;
- Objects to, or refuses to participate in, any activity, policy, practice, or assigned task that the employee (or another person) reasonably believes to be in violation of the ACA; or
- Objects to, or refuses 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 order, rule, regulation, standard, or ban under the ACA.[3]

The provision broadly protects employee rights to ACA-guaranteed benefits and the ability to exercise those ACA rights in the workplace. OSHA issued interim final regulations on Feb. 27, 2013, governing the retaliation provision of the ACA, also known as its "whistleblower" provision.[4] An employee's filing of an ACA retaliation claim with OSHA is an administrative prerequisite to a federal court lawsuit.[5]

Because of the breadth of explicitly defined protected activity, employer missteps with

regard to ACA implementation can complicate discipline and discharge of employees and may provide fertile ground for retaliation claims. To address the increased risk of ACA retaliation claims that will come with the increase in employer communications, business attorneys should be familiar with these claims. In addition, because the regulations set comparatively short time frames (within 20 days after receipt) in which an employer must respond, it is crucial that attorneys know how and when to respond, to properly advise business clients.

Elements of the ACA Retaliation Claim

Generally, a claim for retaliation under the ACA is established if the employee can show that the protected activity was a contributing factor in the adverse employment action and the employer cannot demonstrate through clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. This standard is similar, if not more precise and less stringent, than the standard that applies to a typical claim for retaliation under the Fair Labor Standards Act (FLSA), which houses the ACA retaliation claim. An FLSA retaliation claim requires proof the employer was *motivated* at least in part by the employee's protected activity, while the ACA provision only requires proof the protected activity by the employee *contributed* to the employer's adverse employment decision.[6] Business attorneys should also take note that, to rebut an employee's showing of retaliation, a higher clear-and-convincing-evidence standard must be met instead of a lesser preponderance-of-the-evidence standard.

Employee Rights under the ACA Provide Fertile Ground

The ACA gives employees certain rights that, while long-standing in other countries, are unprecedented in the United States and have never been mandated by the government. The regulations warn that certain ACA employee rights, which purport to provide a benefit to employees, may nonetheless create an incentive for employers to retaliate:

"Under [29 U.S.C. § 218c], an employer may not retaliate against an employee for receiving a credit under section 36B of the Internal Revenue Code of 1986 or a cost-sharing reduction (referred to as a 'subsidy' in [29 U.S.C. § 218c]) under section 1402 of Affordable Care Act. These provisions allow employees to receive tax credits or cost-sharing reductions while enrolled in a qualified health plan through an exchange, if their employer does not offer a coverage option that is affordable and provides a basic level of value (i.e., 'minimum value'). Certain large employers who fail to offer affordable plans that meet this minimum value may be assessed a tax penalty if any of their full-time employees receive a premium tax credit through the Exchange. Thus, the relationship between the employee's receipt of a credit and the potential tax penalty imposed on an employer could create an incentive for an employer to retaliate against an employee."[7]

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Beyond the credits and subsidy, protected activity may occur when an employee objects to any activity, policy, practice, or assigned task that is reasonably believed to be a violation of Title I of the ACA. Title I's rights cover a broad range of activities including employee involvement in "health insurance reforms such as providing guaranteed availability (also known as guaranteed issue) protections so that individuals and employers will be able to obtain coverage when it currently can be denied, continuing current guaranteed renewability protections, prohibiting the use of factors such as health status, medical history, gender, and industry of employment to set premium rates, limiting age rating, and prohibiting issuers from dividing up their insurance pools within markets."[8]

In addition, an employee may engage in protected activity well before receiving any tax subsidy or cost-sharing reduction. For example, after reviewing

the health insurance plan benefits the employer offers, an employee might inform the employer that she does not believe any of the plans offer the minimum required coverage and announce her intent to seek the tax credit or the cost-sharing reduction. In this scenario, while the employee has likely provided information to the employer regarding a violation, it is not necessary for the employee to be correct in the belief that an ACA violation has occurred. All that is required is a reasonable belief by the employee that such a violation has occurred. To have a reasonable belief, the employee must show a subjective, good-faith belief and an objectively reasonable belief that the failure to provide minimum required coverage violates the ACA.

The OSHA Procedure

To pursue an ACA retaliation claim, an employee must file the complaint with OSHA within 180 days after the alleged violation. After filing, OSHA will share the complaint with the IRS, the U.S. Treasury Department, the U.S. Department of Health and Human Services, and any other relevant branches of the Department of Labor. The provision expressly requires information sharing among the agencies that regulate practices under the ACA and creates a more formal system for doing so.

Upon receipt of the complaint from OSHA, an employer is then obligated to respond within 20 days. The employer can provide a written statement, any affidavits substantiating its position, and/or request a meeting with OSHA to present its position in person. This 20-day period is comparatively shorter than the response timeline generally associated with responding to charges in front of the U.S. Equal Employment Opportunity Commission and will require quick action by business attorneys and their clients.

Initially, retaliation complaints are screened to determine if the employee has made a plausible argument that retaliation has occurred. If the employee can show that the employer terminated, disciplined, or imposed an adverse employment decision on the employee because of the employee's protected activity, or if the employee's protected activity was a contributing factor to the employer's decision to impose termination or discipline, the employee may be able to establish a prima facie claim for retaliation.

Similarly, if the employer's termination or discipline occurs shortly after protected activity took place, the action may create an inference that the protected activity contributed to the adverse action. If the circumstances are sufficient to raise an inference that the protected activity was a contributing factor in the adverse action, that showing will be sufficient grounds for investigation and, quite possibly, a later hearing if OSHA finds a violation that the employer elects to contest.

Protected activity is more broadly defined under the ACA retaliation provision than it is under most other federal statutes such as the FLSA or Title VII because the protected activity encompasses virtually all ACA rights guaranteed to each employee. In doing so, it attempts to secure the rights the ACA guarantees to employees and provide a disincentive to employers who may knowingly or unknowingly violate the ACA itself.

If the employee fails to make a prima facie showing, the regulations provide that the complaint should be dismissed.

However, if the employee makes a prima facie showing that the protected activity was a contributing factor to the adverse action, the employer can rebut the prima facie showing by demonstrating through clear and convincing evidence that it would have made the same adverse employment decision in the absence of that activity. If the employer can make such a showing, OSHA may decline to investigate or may discontinue its investigation, depending on when the showing is made.

Following the employer's submission of a written statement in response, OSHA will issue its findings and conclusions within 60 days after the filing of the complaint. Business attorneys should note that the regulations do not permit an extension of the 20-day response period. If an employer fails to make a timely response, OSHA will proceed with its investigation toward meeting the 60-day time frame in which it must issue findings and a preliminary order. In doing so, OSHA is obligated to share the employer's response with the employee. However, there is no regulatory provision that requires OSHA to share any written statements or affidavits submitted by the employee with the employer.

If OSHA determines a violation has occurred, it can order reinstatement, back pay, compensatory damages (for emotional distress), interest on the damages awarded, attorney fees, and costs. Business attorneys should note that, in advance of OSHA's issuance of findings and a preliminary order, if there is reasonable cause to believe that a violation of 29 U.S.C. § 218c has occurred and that reinstatement is warranted, OSHA may contact the employer, or, if represented, its counsel, to provide notice of the evidence OSHA has gathered that supports the employee's allegations during the investigation.

Following this contact, the employer will have at least 10 days to submit a written response, meet with the investigators, present statements from

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witnesses in support of its position, and present legal and factual arguments beyond those already provided, presumably to dissuade OSHA from its belief that a violation exists. Consideration should be given to the possibility of an adverse finding by OSHA. A finding of retaliation will, if ordered, require the employer to reinstate the employee. Notably, the reinstatement order becomes immediately effective upon the employer's receipt of the preliminary order, even if the employer later files an objection to the determination and seeks a hearing.

An employer's attorney can use this time to advise the client about prudent settlement options in light of OSHA's communication that reasonable cause exists to find the client in violation and order the employee reinstated. However, clients must be advised that "[a]ny settlement approved by the Assistant Secretary, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced in United States district court."[9]

In the alternative, OSHA may find that no retaliation occurred and dismiss the claim. Within 30 days after either finding (that is, that retaliation did or did not occur), the losing party may file objections and a request for a hearing before an administrative law judge (ALJ). The same standards of proof apply to the hearing in front of an ALJ. However, the formal rules of evidence do not apply. The ALJ is tasked with securing the most probative evidence using the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.[10]

After the hearing, the ALJ will issue a written decision. This decision becomes final unless either party files objections with the Department of Labor's Administrative Review Board (ARB) within 14 days after the decision. The ARB has the right to accept or reject the request for review. If the ARB does not accept the request for review, the parties can appeal the ALJ's decision to the relevant federal court of appeals. If the ARB elects to review the decision, it must issue its own decision within 120 days after the end of the ALJ hearing. After the ARB issues a decision, the parties then have 60 days to appeal any aspect of the ARB decision to the federal court of appeals.

The Federal Court Option

Employees also have the right to withdraw claims from the administrative-hearing process and file in federal district court. Employees may choose to do so for a variety of procedural reasons. First, if the administrative process exceeds certain time limits, employees gain the right to withdraw the claim from OSHA and move the dispute to federal district court. Specifically, the employee may choose to withdraw only if there has been no final decision by OSHA within 210 days after the complaint is filed. Further, the employee may also file in federal court if a decision has been issued, the decision is not final, and the employee files the complaint in federal court within 90 days after receipt of a written determination.

Second, as with most employment-related claims, employees may seek a jury trial (which they might want to do because of the possibility of a sympathetic jury and a larger award). In an ACA retaliation claim, a jury, or a federal district court following a jury trial, may award the same types of damages as are available in the administrative process, including reinstatement, back pay, compensatory damages, and attorney fees and costs. However, 29 U.S.C. § 218c does not authorize the award of punitive damages.

Minimizing the Risk of ACA Retaliation Claims

As the ACA's implementation date approaches, the number of discussions employers are going to have with their employees is likely to increase substantially. To minimize the risk of ACA retaliation claims, there are several steps business attorneys should consider when advising clients, some of which may mirror the efforts taken to avoid claims under the Sarbanes-Oxley Act.

Implement an Internal Complaint Mechanism

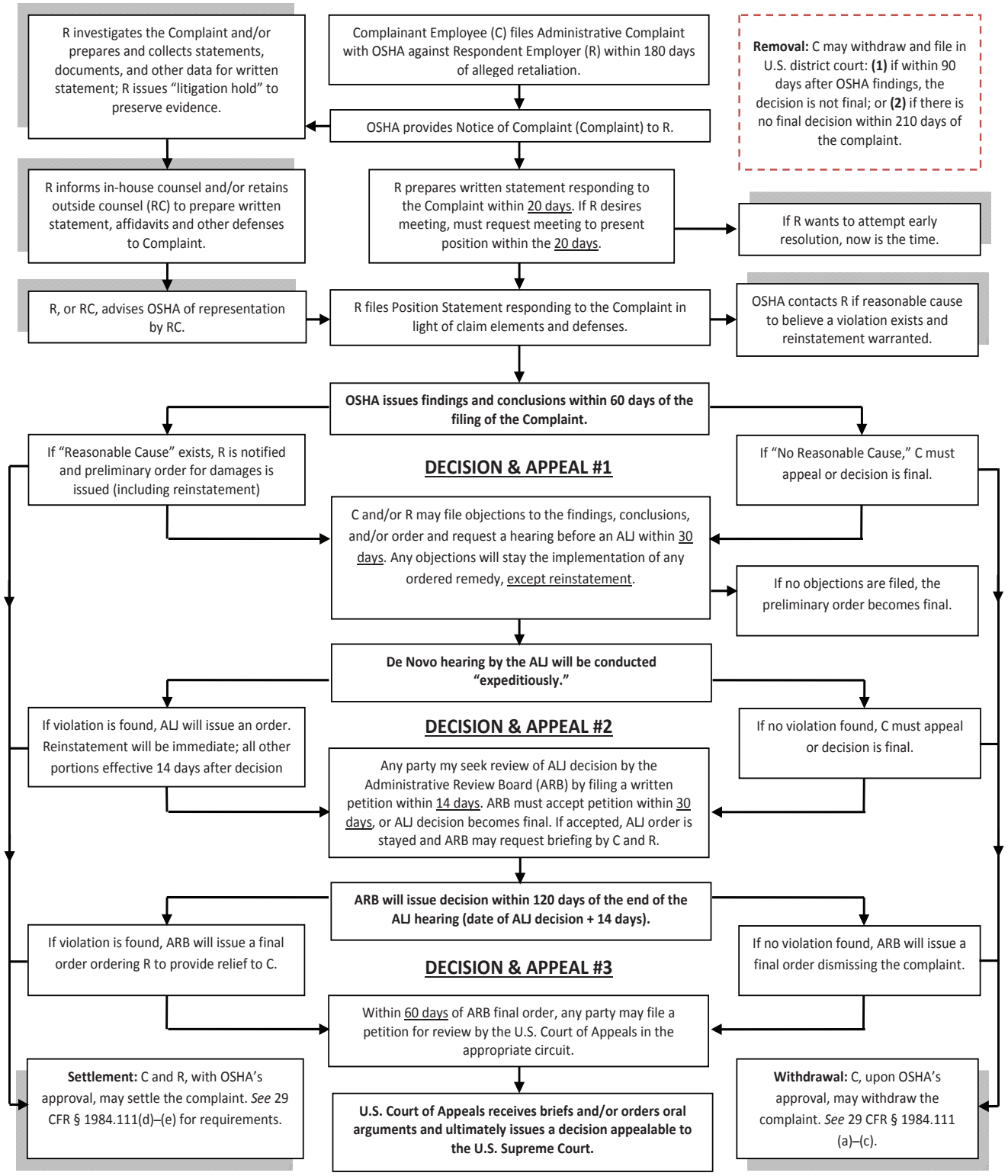
Employers can implement an internal complaint mechanism that directs employees to file health-insurance-related complaints with one or more persons who are not responsible for employee discipline, termination, or health insurance and who are not in a supervisory capacity over the reporting employee, commonly known as the ombudsman.

Structured complaint procedures assure employees that the employer is committed to effective and compliant implementation of the necessary ACA changes. Employees likely will feel more confident that complaints regarding health insurance, including, but not limited to, any employee objections to health insurance affordability, coverage, and other issues, will be taken seriously, investigated and, if necessary, remedied through the appropriate action.

In addition to helping increase employee confidence in the compliance efforts, the procedure offers two additional advantages. First, an internal complaint procedure that directs employee complaints internally to an ombudsman allows the employer to investigate the complaint, correct any systemic or individual errors that may have occurred, and remedy any other issues that must be addressed to resolve employee complaints at the earliest possible stage.

Second, the procedure reduces the likelihood that a direct supervisor or supervisors will make an adverse employment decision based, in part, on an employee complaint, by directing the complaint away from the direct supervisor. If only the ombudsman has knowledge of an employee's complaint, any decision to discharge, discipline, or otherwise impose an adverse employment decision by a supervisor or other supervisory personnel cannot, by definition, be based on the complaint. A

ACA Retaliation Claims and the OSHA Procedure



structured complaint mechanism, which also protects reporting employees, may help smooth out ACA implementation by providing a mechanism for employers to receive information about problems at an early stage and may also create an inherent litigation defense by separating a supervisor from knowledge of any protected activity.

Protect Reporting Employees from Retaliation

To encourage internal reporting by employees, business attorneys must advise their clients to ensure that no employee will be subject to retaliation for accepting the ACA tax credit, opposing a practice the employee believes to be a violation of the ACA, participating in any ACA-related investigations or enforcement action, or engaging in any other protected activity. Any employee who thinks he or she is being retaliated against, or has been subject to retaliation, because of such protected activity should be directed to immediately notify the ombudsman. If the ombudsman subsequently uncovers any problems, the employer should remedy them as soon as possible.

Ensure that Clear and Consistent Communication Is Always the 'Norm'

Business attorneys must emphasize to clients the importance of documenting the legitimate business reason or business justification for adverse employment decisions. If an employee has recently decided to seek or accept a tax credit or has objected to the affordability of the employer's coverage, any failure to document the reason (or subsequent modification of the reason) for a later decision to discipline or terminate will likely complicate an employer's defense of an ACA retaliation claim. In such situations, the employer may be unable to show clear and convincing evidence that it would have made and implemented the same adverse employment decision regardless of any alleged protected activity by the employee. As a result, OSHA, an ALJ, the ARB, a district court, or a jury may be more inclined to discount the employer's allegedly independent reason for the adverse employment decision and to find that the employer's retaliatory motive was a contributing factor in the decision.

Create an Action Plan to Meet OSHA's Quick Deadlines

Finally, business attorneys should advise their clients to prepare a plan for handling ACA retaliation complaints by designating one or more members of an employer's legal department or human resources department or other staff to act promptly after receipt of a complaint. Because the employer will have only 20 days from the date of receipt to provide a written statement or affidavits in response to the complaint or request a meeting with OSHA, an employer that is not aware of the underlying circumstances alleged by the employee must investigate to uncover the underlying facts in order to respond to the complaint.

Prompt action to investigate and document the results of an internal investigation and prepare a written statement and supporting affidavits in response to the ACA complaint will be necessary. Business attorneys should inform their clients that an employer that fails to make a timely response to an ACA retaliation claim will be subject to the results of a continued OSHA investigation without any statement, affidavits, or other evidence or arguments from the client.

Designating who will undertake this work, and what authority that person has to reassign other staff, hire outside counsel, or take other action to prepare an effective written statement and supporting affidavits in response to the ACA complaint, will be crucial to preparing an effective system to respond to the fast-moving ACA complaint procedure.

Conclusion

The retaliation provisions of the ACA create another avenue for current and former employees to challenge discharge, discipline, or any other adverse employment decision. Because of the amount of risk occasioned by employer communication with employees on ACA-related issues and the relatively short time frames associated with these claims, it is crucial for business attorneys to be aware of these procedures and prudently advise their clients on proper business practices. **WL**

ENDNOTES

[1] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[2] ACA § 1558, 124 Stat. at 261.

[3] 29 U.S.C. § 218c(a).

[4] Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 78 Fed. Reg. 13,222 (Feb. 27, 2013) (to be codified at 29 C.F.R. Part 1984). The rules are on the Internet, at www.gpo.gov/fdsys/pkg/FR-2013-02-27/pdf/2013-04329.pdf (last visited Sept. 17, 2013). The discussion in this article is based generally on OSHA's interim final regulations, which, for brevity, are not cited unless quoted directly.

[5] *Jallali v. USA Funds*, 2012 WL 3291873, *5 (S.D. Florida) (dismissing without prejudice plaintiff's claim under 29 U.S.C. § 218c because plaintiff did not exhaust mandatory procedural requirements, including filing OSHA complaint and requesting right to sue from Secretary of Labor before filing in federal court).

[6] *Compare Hernandez v. City Wide Insulation of Madison Inc.*, 508 F. Supp. 2d 682, 688 (E.D. Wis. 2007) (denying summary judgment on FLSA retaliation claim because plaintiff presented adequate comparator evidence to raise suspicion regarding his first suspension, which may have motivated later adverse action by defendant) *with* 78 Fed. Reg. at 13,226 (to be codified at 29 C.F.R. § 1984.104(e)(3)("...a complainant must make an initial prima facie showing that protected activity was 'a contributing factor' in the adverse action alleged in the complaint, i.e., that the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision.").

[7] 78 Fed. Reg. at 13,223 (Background).

[8] *Id.* at 13,225 (to be codified at 29 C.F.R. § 1984.102).

[9] *Id.* at 13,236 (to be codified at 29 C.F.R. § 1984.111(e)).

[10] *Id.* at 13,228 (to be codified at 29 C.F.R. § 1984.107). The OSHA Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. part 18, are available online, at www.oalj.dol.gov/LIBRULES.HTM (last visited Sept. 17, 2013). **WL**