

## Handling of Retaliation Complaints under Section 1558 of the Affordable Care Act

The Occupational Safety and Health Administration (OSHA) recently released a [final rule](#) on the procedures for the handling of whistleblower complaints under Section 1558 of the Patient Protection and Affordable Care Act (ACA). The regulations protect employees (which includes former employees and applicants for employment) who may have been subject to retaliation for seeking assistance under certain affordability assistance provisions, or for reporting potential violations of the ACA's consumer protections.

### **Employers are prohibited from discharging or retaliating against an employee who:**

- Receives credit under section 36B of the Internal Revenue Code of 1986, 26 U.S.C.36B, or a cost sharing reduction under the ACA, or has been deemed eligible for advance payment of the premium tax credit (APTC);
- Provides, or is involved in, the provision of information related to an employee's reasonable belief of an employer's violation of the ACA;
- Testified, or is about to testify, in a proceeding concerning a violation;
- Assisted, or participated, or is about to assist or participate, in such a proceeding; or
- Objected to, or refused to participate in, any activity, policy practice, or assigned task that the employee reasonably believed to be a violation.

A covered employee, or a person acting on their behalf, may file a complaint within 180 days of an alleged violation. Section 18C's whistleblower protections do not replace any protections that a whistleblower may have under the Employee Retirement Income Security Act (ERISA) section 510. Whistleblowers may bring claims under either, or both statutes if their whistleblowing is protected under both.

### **The complaining employee must demonstrate:**

1. That the employee engaged in protected activity;
2. The employer knew, or suspected that the employee engaged in the protected activity;
3. The employee suffered an adverse action; and
4. The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

If OSHA finds there is reasonable cause to believe a violation has occurred, the employer's obligations include reinstatement of the complaining employee to their original position, back pay with interest, compensatory damages and legal expenses.

Practically speaking, this means that both large and small employers should ensure that employees who apply for, or receive, an APTC or tax credit are not singled out, retaliated against, or treated differently from employees who do not receive a tax credit. Employers should consider ensuring that individuals, who have access to that information, properly protect and firewall information relating to Marketplace coverage, enrollment, subsidies, or tax credits.

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