Whistleblower Protections in the Affordable Care Act

by

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I. INTRODUCTION

On March 23, 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119.3 The Act, which is aimed at significantly increasing Americans’ access to health insurance and reducing the overall costs of healthcare, represents the most significant piece of healthcare legislation since the passage of laws establishing the Medicare and Medicaid programs in 1965. Although healthcare is generally thought of in terms of the individual recipient, healthcare and employment have been, and will continue to be, intimately linked because of the large numbers of families that receive healthcare through employer-sponsored insurance programs.4 Because of the interconnected nature of healthcare and employment, the implementation of the ACA will inevitably pose challenges to employers and employees alike. This paper focuses on one subset of these challenges – those posed by potential retaliation against employees for reporting violations of the Act or for simply benefiting from some of its terms – and the whistleblower-protection provisions that Congress included in the Act to address them.

As discussed in more detail below, the ACA redefines the roles that individuals, employers, and insurers play in ensuring affordable access to healthcare for Americans. The Act imposes a complex web of mandates, credits, subsidies and penalties that encourage individuals to obtain coverage, and it facilitate ways for employers and insurers to provide coverage at affordable rates. Although these new requirements will foster an environment in which Americans can access affordable healthcare, they may also give employers and insurers motivation to retaliate against employees who report or oppose violations of the ACA or whose healthcare needs reveal shortcomings in their employers’ coverage. To guard against such retaliation, Congress included Section 1558 of the ACA, which added section 18C to the Fair Labor Standards Act (“FLSA”), providing a remedy for employees who experience retaliation for receiving a tax credit or cost-sharing subsidy under the Act, or for opposing violations of Title I of the Act. 29 U.S.C. §218 (1938), amended by Pub. L. 111-148, § 1558 (2010).

On February 22, 2013, the United States Department of Labor’s Occupational Safety & Health Administration (OSHA) issued its interim final rule setting out the standards and procedures for addressing retaliation complaints under Section 1558 of the ACA. See Procedures for Handling of Retaliation Complaints under Section 1558 of the Affordable Care Act, (proposed February 22, 2013) (to be codified at 29 C.F.R. pt. 1984) (hereinafter referred to as the “Interim Rule”) available at http://www.dol.gov/find/20130222/OSHA2013.pdf. Although there is currently no case law addressing the content and scope of the ACA

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3 The ACA was amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, which was signed into law on March 30, 2010 (codified in scattered sections of the U.S. Code) (hereinafter referred to as “the Act” or “ACA”).

4 According to the United States Bureau of Labor Statistics’ National Compensation Survey, over 50 percent of Americans receive health insurance coverage from their employers, and as of March 2011, 70 percent of all private-sector workers had access to healthcare benefits through their employers. See Brian Mauersberger, UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, TRACKING EMPLOYMENT-BASED HEALTH BENEFITS IN CHANGING TIMES 2 (January 27, 2012), available at http://www.bls.gov/opub/cwc/cm20120125art01p1.htm.
whistleblower retaliation provision, the language of section 1558 mirrors that of other OSHA
enforced statutes and therefore will likely be interpreted similarly.5

This paper addresses the anticipated effect of the ACA whistleblower-retaliation
provisions on the landscape of employment law. The paper starts with a brief overview of the
statutory history of the ACA and its whistleblower provisions. The paper will then discuss the
elements that a plaintiff must establish in order to make out a whistleblower retaliation claim
under the Act. Finally, the paper will detail the administrative steps that an employee must
follow when filing a claim under the Act must follow and the potential practical considerations
in this process.

II. STATUTORY BACKGROUND

A. The Patient Protection and Affordable Care Act

Designed to facilitate coverage for roughly 32 million more Americans by January 2014,
the ACA marks a significant shift in healthcare policy in the United States. Prior to the
enactment of the ACA, individuals were free to choose whether or not they wanted to be insured.
Although this preserved an individual’s right of freedom of choice, the lack of government
control over the system kept competition low, the price of coverage high, and the eligibility
criteria for coverage strict. As a result, many Americans who were not covered by their
employers, who could not afford coverage, or who were plagued by “pre-existing” conditions
often found themselves without coverage. The drafters of the ACA revisited the relationship
between the individual, the insurer and the employer and devised a framework that would
guarantee affordable coverage for all Americans regardless of finances or pre-existing
conditions.6

1. The Act’s Impact on Individuals

The ACA imposes an individual health insurance mandate on all Americans to obtain the
“minimum essential” healthcare coverage unless they are exempt under the law.7 Prior to the

5 See the Interim Rule at 9: “The regulatory provisions in this part have been written and organized to be consistent
with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of the statutory
language of section 18C of FLSA and 15 U.S.C. 2097(b) of CPSIA.”

The Department of Labor’s Office of Administrative Law Judges maintains a very useful library containing a
comprehensive collection of materials, including well-organized case digests, for lawyers prosecuting and defending
whistleblower-retaliation claims under some 23 OSHA-enforced statutes. See
http://www.oalj.dol.gov/LIBWHIST.HTM.

6 See Sara Rosenbaum, Realigning the Social Order: The Patient Protection and Affordable Care Act and the U.S.
Health Insurance System, 7 J. HEALTH & BIOMEDICAL LAW 1, 4 (2011) (discussing society’s changing roles in the
wake of the ACA and potential implications).

7 I.R.C. § 5000A et seq. Exemptions from the Act’s individual mandate requirement include individuals who: opt
out on religious grounds (§ 5000A(d)(2)); are not lawfully present in the U.S. (§ 5000A(d)(3)); are incarcerated (§
5000A(d)(4)); cannot afford coverage because the monthly premium exceeds eight percent of their household who
have incomes below the tax filing threshold (§ 5000A(e)(1)); are members of Native American tribes (§
ACA, individuals were not required to maintain any level of insurance coverage. Although most Americans desired health insurance, the high cost and selective nature of the coverage that existed prior to the ACA frequently discouraged, and even prohibited, many individuals from accessing such coverage. The new individual mandate under the ACA is designed not only to incentivize individuals to protect themselves with insurance, but also to create greater demand for coverage and thereby drive down the price of insurance throughout society.

The ACA defines “minimal essential” coverage as: coverage under a government-sponsored program such as Medicare and Medicaid; coverage under an employer-sponsored plan; plans in the individual market; grandfathered health plans; or other health-benefits coverage, such as a state health benefits risk pool, that the Secretary of Health and Human Services recognizes for this subsection. I.R.C. § 5000A (f)(1)(A)-(E). Failure to obtain minimal essential coverage for one or more months will result in a penalty imposed upon the delinquent taxpayer. I.R.C. § 5000A(b)(1). The penalty for an individual is set at $695 and varies in amount for families, ranging up to a maximum of three times the individual amount. I.R.C. § 5000A(c)(1)-(4).

Beginning on January 1, 2014, individuals will be able to purchase affordable health benefit plans in a transparent, competitive marketplace on statewide insurance “exchanges.” Although the exchanges are expected to lower the cost of individual insurance coverage, coverage will still be unobtainable for individuals at certain income levels. Accordingly, sections 1401 and 1402 of the ACA provide for tax credits and cost-sharing plans for low- to middle-income families so that they can purchase insurance under a qualified health plan in the exchange. In particular, the ACA provides for refundable premium tax credits\(^8\) and reduced cost sharing\(^9\) paid for by the federal government. Individuals whose household income for the taxable year equals or exceeds 100 percent, but does not exceed 400 percent, of the federal poverty level will qualify for the tax credits and cost-sharing subsidies. I.R.C. § 36B (c)(1); 42 U.S.C. § 18071(c)(1)(A)(i)-(iii). Like coverage through the exchanges the tax credits and cost-sharing plans will become available in January 2014.

2. The Act’s Impact on Employers

The ACA imposes new requirements on larger employers with the threat of penalty if not followed. Employers have been – and continue to be – the largest source of healthcare coverage for Americans, comprising 55.3% of all healthcare coverage in the United States in 2010.\(^{10}\) Because employers remain a vital source of healthcare coverage for the majority of Americans, the ACA takes special care to ensure that employers provide some minimal level of coverage to their employees at an affordable price.

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\(^{5000A(c)(3))\); are facing short coverage gaps (§ 5000A(c)(4)); or who are determined to have “suffered a hardship with respect to the capability to obtain coverage under a qualified health plan (§ 5000A(c)(5)).

\(^{8}\) I.R.C.§ 36B et seq.

\(^{9}\) 42 U.S.C. § 18071 et seq.

\(^{10}\) Mauersberger, *supra* note 4, at 2.
Beginning January 1, 2014, “applicable large employers” are strongly encouraged to offer their full-time employees (and their dependents) the opportunity to enroll in “minimum essential coverage” under an employer-sponsored plan. I.R.C. § 4980H (a)(1). An “applicable large employer” is “an employer that employed an average of at least 50 full-time employees on business days during the preceding calendar year.” I.R.C. § 4980H (c) (2) (A). The statute provides for a limited exception to this rule if the employer’s workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and the employees in excess of 50 employed during this period are seasonal workers. I.R.C. § 4980H (c)(2)(B)(i)-(ii). A “full-time employee” is an employee who is employed on average at least 30 hours a week. I.R.C. § 4980H (a)(2).

Although the ACA does not impose an express, affirmative obligation on employers with 50 or more full-time employees to provide minimal essential coverage, it does impose a penalty on such an employer if at least one of the employer’s full-time employees enrolls in a qualified health plan for which an applicable premium tax credit or cost-sharing reduction (discussed above) is allowed or paid with respect to the employee. I.R.C. § 4980H (a)(2). Even if an “applicable large employer” offers its employees the opportunity to enroll in minimal essential coverage under an eligible employer-sponsored plan, that employer may nonetheless be subject to penalty if the employer’s insurance either fails to pay for at least 60 percent of the employee’s covered health care expenses or requires the employee to pay more than 9.5 percent of family income for the employer coverage. I.R.C. § 4980H (b)(1)(A)-(B).

3. **Insurers**

Title I of the ACA contains a wide range accountability policies for insurance companies that are designed to ensure individual access to affordable coverage and prevent unnecessary denials of coverage and the setting of premiums based on gender, industry of employment and past medical history, among others. Prior to the ACA, private insurers had wide discretion to determine whom to cover, the scope of coverage, and the rate of coverage. Because an individual’s gender, pre-existing conditions and past medical history, for example, impact on the anticipated level of future coverage and expense, these traits were frequently used in determining who was afforded coverage and at what price. Beginning January 1, 2014, insurers will be prohibited from denying coverage to an individual based on a pre-existing condition, as well as from using health status, medical history, gender, and industry of employment to set insurance rates.

**B. Whistleblower Provisions**

Although on the surface the redefinition of the roles and responsibilities of individuals, employers, and insurers in the healthcare context may not appear to raise whistleblower concerns, a deeper look at the interplay between the mandates, credits, subsidies, and penalties created under the Act reveals a backdrop that is ripe for potential retaliation. To start, the existence of penalties for employers who do not provide minimal essential coverage and whose employees become eligible for tax credits or cost-sharing subsidies, creates an incentive for employers to retaliate against employees who apply for such credits or subsidies, which the
employees need in order to satisfy their own legal obligation to maintain coverage. In addition, Title I’s new prohibition on the denial of coverage based on pre-existing conditions, as well as prohibitions on the use of health status, medical history, gender, and industry of employment to set insurance rates, place additional burdens on insurers that potentially create incentives to retaliate against an employee who opposes the denial of coverage, or increase of premiums, on any of the named bases in Title I.

It was in order to discourage and remedy such retaliation that Congress, with Section 1558 of the ACA, amended the FLSA to add Section 18, 29 U.S.C. 218C (Section 18C), which prohibits both public and private sector employers from retaliating against an employee because he or she has received a credit under section 36B of the Internal Revenue Code of 1986 or a cost-sharing reduction under section 1402 of the Affordable Care Act, discussed above. The law also protects employees against retaliation for reporting violations outlined in Title I of the ACA.

With respect to the latter category of protected activity, the ACA provides broad protection against retaliation for a variety of different activities including, (1) providing or causing to be provided any information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of Title I to the employer, federal government, or attorney general of a state; (2) testifying, or assisting or participating, in proceedings concerning such violations; (3) andobjecting to, or refusing to participate in, any policy, practice, or assigned task that the employee reasonably believes to be in violation of any provision of Title I, or any order, rule, regulation, standard, or ban under Title I. 29 U.S.C.§ 218C(a)(1)-(5). This coverage will expand in 2014 to cover retaliation by health insurers offering group or individual health insurance coverage, regardless of whether those issuers are the employer of the person retaliated against.

III. LEGAL FRAMEWORK

Under the interim rule, an employee who believes that he or she has been discharged or otherwise discriminated against with respect to his or her compensation, terms, conditions, or other privileges of employment for engaging in protected activity under Section 1558 of the ACA may file a complaint with OSHA within 180 days of the claimed retaliation. Because the rule is still in the interim stages, no case law exists defining the standards that an aggrieved employee must meet in order to make a prima facie case of retaliation. Nevertheless, the interim

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11 According to a story aired on National Public Radio’s All Things Considered show on April 29, 2013, there is evidence that employers with 50 or more full-time employees are already starting to shift their workforces from full-time to part-time to avoid having to pay healthcare costs for employees who work 30 or more hours per week. For example, Papa John’s pizza chain publically stated that it is considering reducing workers’ hours to stay under the 30-hour-a-week threshhold. Although studies on the impact of the ACA predict that the new mandate on employers will not affect most workers, statistics show that at least two million workers could end up with fewer hours – and without coverage – as a result of their employers’ reaction to the ACA. All Things Considered: As Health Law Changes Loom, A Shift to Part-Time Workers (NPR broadcast Apr. 29, 2013) (transcript available at http://www.npr.org/2013/04/29/179864601/as-health-law-changes-loom-a-shift-to-part-time-workers).

12 Title I represents the core of the ACA and is close to 400 pages long. Among the notable provisions in Title I are prohibitions on the denial of insurance coverage based on pre-existing conditions; extension of dependent coverage up to age 26; and prohibitions on rate-setting based on gender, health status, medical condition, claims experience, genetic information, evidence of domestic violence, and other health-related factors.
A. Covered Entities

To bring a claim under Section 1558, an aggrieved employee must be a covered employee who was working for a covered employer. The definitions of “employer” and “employee” under Section 1558 are found in the FLSA. Beginning January 2014, the anti-retaliation provisions will expand to apply to issuers offering group or individual health insurance, thus allowing covered employees to bring claims directly against the insurance entity that provides coverage to the employee, regardless of whether such entity is the employee’s employer. This represents a significant expansion of coverage as compared with other whistleblower statutes administered by OSHA, and could give rise to a potentially huge increase in the number of federal whistleblower cases in coming years.

1. Employees & Employers

An “employee” is defined under the FLSA as “any individual employed by an employer.” 29 U.S.C. § 203(e)(1). Both private sector and public sector employees are protected, except for the rare public-sector employee who is “not subject to the civil service laws of the State, political subdivision, or agency which employs him; and who holds a public elective office of that State, political subdivision, or agency.” 29 U.S.C. § 203(e)(2)(c). The term “employee” includes former employees and applicants for employment, 29 U.S.C. § 215(a)(3), which means that actionable claims can arise before (failure to hire) and after (blacklisting) the existence of the employment relationship.

An “employer” is defined broadly under the FLSA as including “any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.” 29 U.S.C. § 203(d). “Person” includes “an individual partnership, association, corporation, business trust, legal representative, or any organized group of persons.” 29 U.S.C. § 230(a).

2. Insurers

In January 2014, the anti-retaliation provisions of Section 1558 will expand to apply to health issuers offering group and individual health plans. The employee need not be an employee of the insurer to be protected. To the contrary, an employee will be protected from retaliation by both his or her employer and by the insurance carrier that provides the health coverage to the employer.
B. Proving a Whistleblower Claim Under the ACA

To make out a successful claim or retaliation under Section 1558 of ACA, an employee will need to show (1) that he or she engaged in protected activity; (2) that the employer took an unfavorable employment action against the employee; and (3) that the employee’s protected activity was a contributing factor in the employer’s decision to take an unfavorable employment action against the employee.

1. Protected Activity

In order to prove unlawful retaliation under the ACA, an employee must show that he or she engaged in protected activity as defined by the Act. There are two broad categories of protected activity under the Act. First, employees are protected against retaliation for receiving a tax credit under Section 36B of the Internal Revenue Code of 1986 or a cost-sharing reduction under Section 1402 of the ACA. Second, employees are protected against retaliation for providing information relating to any violation of any provision of or amendment to Title I of the Act.

a) Affordability Assistance: Receipt of Credit or Subsidy

The first category of protected activity, which arises from an employee’s receipt of a tax credit or cost-sharing subsidy, can be found in Section 18C(a)(1) of the newly amended FLSA, which now provides:

(a) No 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:

(1) Because the employee (or an individual acting at the request of the employee) has received a credit under 36B of the Internal Revenue Code of 1986 or a subsidy under section 1402 of the Act.

29 U.S.C. § 218C(a)(1). Under OSHA’s interim rule, an employee’s receipt of the tax credit under 36B or cost-sharing subsidy under section 1402 of the Act is the trigger that entitles that employee to whistleblower protection.

Although this provision appears to be written very broadly, there are some inherent limitations imposed by the tax credit, cost-sharing, and employer penalty provisions that should be kept in mind. The affordability assistance anti-retaliation provision was designed to guard against an employer taking retaliatory action against employees whose lack of coverage exposes the employer to a penalty under the ACA. Accordingly, the applicability of this provision will most likely only arise where an employer actually faces the threat of penalty as a result of the employees’ actions, and thus has a plausible motive to retaliate. As discussed above, an employee’s application
for a tax credit or cost-sharing subsidy will only expose an employer to liability in certain circumstances, namely where:

- The employer employed 50 or more full time-employees during the preceding calendar year; and either
  - The employer fails to provide minimal essential coverage to its full-time employees, and at least one full-time employee receives a tax credit under 36B or a cost-sharing subsidy under 1402; or
  - The employer provides coverage to its full-time employees but the coverage fails to cover at least 60 percent of covered health care expenses for a typical population, and the employee purchases healthcare on an exchange with the assistance of the tax credit; or
  - The employer provides coverage to its full-time employees but the employer’s coverage requires the employee to pay more than 9.5 percent of family income for the employer coverage, and the employee purchases healthcare on an exchange with the assistance of the tax credit.13

The concept of protected activity is thus tied to the employer’s exposure to penalty. While it is possible that an employer would retaliate against an employee who receives a tax credit or cost-sharing subsidy under circumstances that do not trigger penalties for the employer, the absence of the penalty makes it less likely that the employer would be motivated to retaliate. In that instance, it will likely be more difficult for the employee to show that the employer retaliated against him or her “because of” his or her receipt of such tax credit or cost-sharing subsidy.

b) Title I: Protected Disclosures

The second category of protected activity, which focuses on an employees’ provision of information regarding perceived violations of Title I, can be found at Sections 18C (a)(2)-(5) of the FLSA, 29 U.S.C. § 218C(a)(2)-(5):

(a) No 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:

(2) 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

13 See I.R.C. § 4980H(a)-(b); see also The Kaiser Foundation: Penalties for Employers Not Offering Affordable Coverage Under the Affordable Care Act Beginning in 2014 (flow chart explaining specific scenarios when employer penalties apply) (available at http://healthreform.kff.org/~media/Files/KHS/Flowcharts/employerPenaltiesFlowchart1.pdf).
information relating to any violation of, or any act or omissions the employee reasonably believes to be a violation or, any provision of this title (or an amendment made by this title); or

(3) testified or is about to testify in a proceeding concerning such violation; or

(4) assisted or participated, or is about to assist or participate, in such a proceeding; or

(5) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this title (or amendment), or any order, rule, regulation, standard, or ban under this title (or amendment).

Under OSHA’s interim rule, an employee who discloses information in the manner outlined in sub-sections 18C(a)(2)-(5) that pertains to any act or omission the employee reasonably believes to be a violation of any provision of Title I, has engaged in protected activity under the ACA. Title I contains the core provisions of the ACA, including prohibitions on lifetime limits on coverage and exclusions due to pre-existing conditions, as well as prohibitions against setting premiums based on health status and gender. Importantly, an employee need only “reasonably believe” a violation exists in order to be protected under the Act, and need not prove that violation has actually occurred. Even though no case law has yet emerged to guide the application of the ACA whistleblower provisions, OSHA’s interim rule indicates that it will, at a minimum, borrow the “reasonable belief” standard from the Sarbanes-Oxley Act’s (“SOX”) whistleblower provisions that OSHA administers. SOX was enacted in 2002 in the wake of popular outrage over the Enron, MCI, and similar corporate scandals and provides for robust whistleblower protection to employees of publicly-traded companies who allege that they were retaliated against because they provided information about, or participated in an investigation relating to, what they reasonably believe constituted fraud. See 18 U.S.C. § 1414A (“SOX 806”). In order to have a “reasonable belief” under SOX, a complainant must have both a subjective, good-faith belief and an objectively reasonable belief that the complained-of conduct violates one of the listed categories of the law.

Although the contours of what constituted a “reasonable belief” under SOX were initially strictly construed, the Administrative Review Board – the appellate agency charged with issuing final agency decisions arising under OSHA – has begun in the past several years to relax this standard and make it more whistleblower-friendly. Beginning with Sylvester v. Parexel Int’l LLC, ARB No. 07-123, 2011 WL 2165854, at *11-12 (ARB May 23, 2011), the ARB’s decisions have shown a steady trend in the direction of strengthening protections for whistleblowers under SOX, primarily by expanding the definition of protected activity under the Act. In particular, the ARB has rejected the “definitively and specific” standard it had employed for several years, requiring whistleblowers to demonstrate that their protected activity was closely tied to specific violations mentioned in the statute, in favor of a more relaxed standard that recognizes the importance of protecting employees who speak out about perceived wrongdoing at risk to their jobs. Under the new standard established by Sylvester, a complainant has a subjective, good-faith belief so long as she actually believed, with some basis, that the
conduct complained of violated the relevant law. \textit{Id.} The complainant need not show that the complained of conduct actually violated the law so long as the complainant’s protected activity was based on a reasonable, good-faith belief. Thus, employee’s whistleblowing activity is protected where it is based on a reasonable, even if mistaken, belief that a violation of the relevant law has occurred. \textit{Id} at *13.

The loosening of the reasonable belief standard under SOX will prove beneficial for whistleblowers seeking protection under the ACA. On March 19, 2013, the United States Court of Appeals for the Third Circuit in \textit{Wiest v. Lynch}, No. 11-425 (3rd Cir. March 19, 2013), issued a landmark decision rejecting the district court’s use of the more restrictive “definitively and specifically” standard in a SOX retaliation case, and adopting the ARB’s “reasonable belief” standard set forth in \textit{Sylvester}. The decision is notable not only for its embrace of the relaxed \textit{Sylvester} standard, but also because it expressly held that the ARB’s decision in \textit{Sylvester} was entitled to deference by the courts under \textit{Chevron U.S.A. Inc. v. Nat’l Res. Def. Council}, 467 U.S. 837 (1984). Prior to this ruling, it was unclear what level of deference federal courts would afford \textit{Sylvester} and other recent ARB decisions. By expressly rejecting the district court’s ruling, the Third Circuit sent a strong signal that the courts are ready and willing to embrace a broader standard for protected activity under SOX and other similarly worded OSHA statutes.

2. \textit{Unfavorable Employment Action}

Second, the employee must show that the employer took an unfavorable employment action against the employee. The ACA recognizes a wide range of unfavorable employment action, including firing or laying off; blacklisting; demoting; denying overtime or promotions; disciplining; denying benefits; failing to hire or rehire; intimidation; making threats; reassigning affecting prospects for production; and reducing pay or hours.\textsuperscript{14}

3. \textit{Causation}

Finally, the employee must show that the protected activity was a “contributing factor” in the employer’s decision to take unfavorable employment action against the employee. An employee’s protected activity is a contributing factor where the activity, alone or in combination with other factors, affected in some way the outcome of the employer’s decision. Importantly, a complainant need not prove that the respondent’s articulated reason for the adverse decision was pretextual. Even if the respondent’s reason is true, a complainant may still prevail by showing that the respondent’s reason, while true, is only one of the reasons for the adverse employment decision and the complainant’s protected activity also influenced the decision. \textit{See} the Interim Rule at 18, citing \textit{Kolpfenstein v. PCC Flow Techs. Holdings, Inc.}, ARB No. 04-149, 2006 WL 3246904, at *13 *ARB May 31, 2006) (quoting \textit{Rachid v. Jack in the Box, Inc.}, 376 F.3d 305, 312 (5th Cir. 2004)) (discussing contributing factor test under the Sarbanes-Oxley whistleblower provision).

IV. Administrative Procedures

An employee who believes that he or she has been unlawfully retaliated against under the ACA must file a complaint with OSHA within 180 days of when the alleged violation occurred. The complaint need not be in any particular form and may be written or oral. In addition, as with the pleading requirements for other OSHA-enforced statutes, written complaints filed under the ACA are not considered formal documents and need not conform to the pleading standards for complaints filed in federal district court. See the Interim Rule at 15, citing Sylvester v. Parexel Int’l, Inc., ARB No. 07-123, 2011 WL 2165854, at *9-10 (ARB May 26, 2011) (holding whistleblower complaints filed with OSHA under analogous provisions in the Sarbanes-Oxley Act need not conform to federal court pleading standards).

Once a complaint is filed with OSHA, that agency is charged with determining whether the complaint alleges “the existence of facts and evidence to make a prima facie showing.” 29 CFR 1984.104(e). If the complaint does set forth a prima facie case and the respondent does not show, by clear and convincing evidence, that it would have taken the same action in the absence of the alleged protected activity, OSHA will conduct an investigation to determine whether there is reasonable cause to believe that retaliation occurred. 15 U.S.C. 2087(b)(2), 29 CFR § 1984.104(e). If the complainant fails to establish a prima facie case, or the employer demonstrates, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity, then the investigation will be discontinued and the complaint dismissed.

In either case, OSHA is required to issue written findings as to whether there is reasonable cause to believe the complaint has merit within 60 days of filing. If OSHA finds reasonable cause to believe that retaliation has occurred, it will issue a preliminary order requiring the employer or issuer to take appropriate action. Among the remedies available for whistleblowers under Section 18C are reinstatement, affirmative action to abate violation, back pay, front pay, compensatory damages, and costs and expenses including attorneys’ fees. 29 CFR § 1984.105.

If either party disagrees with the determination, that party may file written objections to the OSHA determination within 30 days of receiving the findings or order, and request a hearing before an administrative law judge (“ALJ”). The filing of objections will automatically stay the preliminary order’s provisions, with exception of the requirement that the employer reinstate the former employee. If neither party objects to the findings or requests a hearing within 30 days, OSHA’s findings and preliminary order become final and will not be subject to judicial review. A complainant is free to withdraw his or her complaint at any time prior to the date an objection is filed. The ALJ’s decision and order may be appealed to the ARB.

If a final agency order is not issued within 210 days from the date the complaint was filed, or within 90 days after the complainant receives OSHAs findings, then the employee may remove the complaint from OSHA and file a lawsuit in the appropriate United States District Court, which hears the case de novo.
V. CONCLUSION

The whistleblower-protection provisions of the ACA pose a challenge for practitioners representing both employees and employers. For plaintiff-side lawyers, the new law opens up vast new area of potential retaliation claims under a statute that allows reinstatement and recovery of back pay, compensatory damages and attorneys’ fees. For the first time, tens of millions of employees will enjoy such protection against retaliation by their employers, and in early 2014 by the insurers who provide coverage under employer-sponsored plans as well, for engaging in a wide range of protected activity. Some forms of protected activity under the ACE is very different from conduct that is generally viewed as “whistleblowing” in that the employee is protected for merely obtaining certain benefits under the law and need not have spoken out or blown the whistle on perceived violations of the law. On the employer side, practitioners will need to counsel their clients to look out for and prevent unlawful retaliation, a task made difficult by the fact that many employers, and especially mid-level management who interface with insured employees every day, will likely need some time to fully understand the implications in the workplace of the unprecedented requirements that the ACA imposes on many employers.