Food Safety Modernization & Whistleblowing Protection

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Most food manufacturers already know about the Food Safety Modernization Act's (FSMA) new guidelines requiring more FDA inspections and more oversight to prevent foodborne illness, but a little known aspect of the legislation could have just as big of an impact on the industry. *Food Manufacturing* spoke with Allen B. Roberts of EpsteinBeckerGreen about the FSMA's whistleblowing provisions that protect employees who raise food safety issues.

Q: What protections has FSMA given to food workers?

A: FSMA applies to employers in the chain of food manufacturing, processing, packing, transportation, distribution, reception, holding or importation. Workers are protected against retaliatory personnel actions for whistleblowing. That means 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 whistleblowing activity.

Q: How broad are these protections?

A: FSMA whistleblowing is broadly defined and framed in two separate respects:

- The nature of the food safety issue that is raised – the content or subject matter of the whistleblower's message, and
- The employee activity raising the food safety issue – the manner in which the whistleblower's message is communicated and the recipient of that message.

Substantively, the nature of the whistleblower activity must relate to an issue reasonably believed by the employee 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. It remains to be seen how the law will be interpreted and enforced, but the topics considered could be diverse and related to food hazards, contamination, adulteration, misbranding and foodborne diseases.

Employees will receive whistleblower protection under FSMA for their activity only if they engage in one of the specific types of activity recognized by the new law. FSMA protects individuals if they:

- 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 the FDCA, or any act or omission the employee reasonably believes to be an FDCA violation;
- Testify, or are about to testify, in a proceeding concerning an FDCA violation;
- Assist or participate, or are about to assist or participate, in a proceeding concerning an FDCA violation; or
- 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.

Q: How will investigations be conducted under this provision?

A: Normally there are distinct types of investigations involving whistleblower complaints. Internally, covered employers are likely to investigate the food safety issue raised by the employee to learn if there is a safety or compliance breach that needs to be addressed with an appropriate response. A second internal investigation is likely to relate to whether the whistleblower has suffered any unfavorable personnel action for which protected activity was a motivating factor.

An external investigation will be conducted by the Occupational Safety and Health Administration (OSHA) if the whistleblower files a complaint alleging that unlawful retaliation resulted from activity protected by FSMA.

Q: How will the whistleblower provisions affect the food manufacturing industry?

A: Because any employee observing a covered food safety issue may be entitled to FSMA whistleblower protections, the statute imposes responsibilities on a broad

range of food manufacturing businesses and their entire structure of management and supervisors to assure safe activities with respect to food and to assure that information obtained by way of whistleblower complaints receives appropriate consideration and response.

Unlike other whistleblower laws that tend to provide protection for a few individuals with access to extremely confidential information known only at the highest levels within an organization, virtually anyone at any level within a covered business could possess the sort of information addressed by FSMA's whistleblower protections. In addition, a FSMA whistleblower potentially is protected by simply raising a reasonably held concern about an FDCA violation to the "employer." Interpretation of the law will shape the contours of where corporate responsibility will lie in the managerial and supervisory hierarchy of covered organizations. But individuals having authority to implement and execute corporate policies and direct the workforce should be trained so they fulfill corporate expectations concerning food safety and the receipt of whistleblower reports and responses to them.

Q: What actions should employers take to prepare for this new legislation?

A: For each employer, action steps to comply with FSMA whistleblower coverage should be consistent with corporate culture, policies, procedures and practices. Most compliance preparedness will take account of the following suggested measures:

- 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 managers and supervisors know their responsibilities as employer representatives to report and respond in a manner consistent with established guidelines.
- Manage the communication of confidential information.

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