Published on *The National Law Review* https://natlawreview.com

Food Safety Modernization Act (FSMA) Whistleblower Lawsuit Filed in Federal Court

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Food industry should be aware of new risks associated with whistleblower protections for food and beverage company employees.

On June 6, one of the first whistleblower lawsuits under the Food Safety Modernization Act (FSMA) was filed in the U.S. District Court for the Western District of New York by a former employee of Brothers International Food Corporation. The FSMA—the most extensive change to the U.S. food safety system in more than 70 years—was signed by President Barack Obama in 2011 and directs the U.S. Food and Drug Administration (FDA) to issue numerous regulations and take additional measures to enhance food safety in an effort to minimize the risk of foodborne illnesses to consumers. To advance that broad goal, section 402 of the FSMA includes "employee protection" whistleblower provisions aimed at ensuring the food safety concerns of food and beverage company employees are taken seriously.

The FSMA prohibits an employer from discharging or otherwise discriminating against an employee for engaging in certain protected activity, including reporting concerns to his or her employer, the federal government, or a state attorney general. To qualify as protected activity under the FSMA, the employee's report need not establish that the conduct in question violated food safety laws. Rather, an employee must only have had an objectively reasonable belief that the employer's practices were violating a provision of the Federal Food, Drug, and Cosmetic Act or any order, rule, regulation, standard, or ban issued by FDA. The significant new regulatory requirements being implemented under the FSMA—including, among others, preventive controls, produce safety, and import verification—provide whistleblowers with raft of potential new areas for complaints.

Brothers International Lawsuit

The one-count complaint filed by Colin Chase, the former director of eCommerce at Brothers International, alleges that the Rochester, New York-based food and beverage company violated the whistleblower protections of the FSMA when it terminated his employment and sued him following his complaints about food safety practices at the company.[1]

Chase claims that he was terminated in July 2012 in retaliation for repeatedly raising a variety of concerns about the re-dating and sale of expired food products, including food products marketed to toddlers. Chase alleges that, upon raising these concerns with company management, he was directed to lie to customers about the reasons for the re-dating, and, after he complained, the company asked him to "prove his loyalty" by signing a nondisclosure/noncompetition agreement. When he refused to sign the agreement without first reviewing it with his attorney, Chase alleges that he was immediately terminated and escorted off of the company's premises. He claims that employees who had not complained about food safety were given more time to review similar agreements with an attorney, more latitude to negotiate the terms of such agreements, and a chance to be rehired after initially refusing to sign similar agreements.

Following his termination, Chase informed the company that he believed his termination violated his rights under the FSMA and that he intended to pursue an FSMA whistleblower claim against the company. Chase further states that, following this notification, the company filed two lawsuits against him (one of which is still pending), claiming that he wrongly stole confidential company information. Chase alleges that the lawsuits were initiated for "the sole purpose of further retaliating against [him] because he was about to make a FSMA protected disclosure to OSHA." As is permitted under the FSMA, Chase seeks back pay and front pay, compensatory and "special damages," prejudgment interest, and attorney fees. Notably, "special damages" has been construed under similar whistleblower protection statutes, such as the Sarbanes-Oxley Act, to include damages for pain, suffering, mental anguish, and an injured career or reputation.

Brothers International states that Chase was fired for lawful, legitimate reasons and that "[a]ny insinuation by Chase that Brothers' products were defective is patently false. There has never been any finding of any kind of defective products." The company states it intends to file a motion asking the court to dismiss the case immediately.

Broad Implications for the Food Industry

The U.S. Department of Labor has released statistics showing that, during fiscal years 2011 and 2012 (the two fiscal years during which the FSMA has been in effect), OSHA received a total of 38 complaints filed under the FSMA's whistleblower provisions. While it is unclear exactly how many of these complaints have resulted in a lawsuit being filed, the FSMA's whistleblower provisions pose an additional challenge to a food industry that finds itself under attack from an increasingly aggressive plaintiff's bar.

In addition, an increase in whistleblower actions has additional regulatory and enforcement implications for the food industry. Such whistleblower information will almost certainly be shared with FDA, potentially resulting in additional inspections for affected firms and increasing the likelihood of FDA enforcement action. Similarly, in cases of alleged product adulteration, FDA's mandatory recall authority (also newly granted under the FSMA) could be implicated as well as product seizure and civil monetary penalties. Finally, if the conduct in dispute involves misbranded or adulterated products purchased through federally funded programs, the manufacturer in question could be subject to liability under the Federal False Claims Act as well as other administrative sanctions, such as debarment.

As FDA implements its regulations under the FSMA, companies must keep in mind this new category of business risk and ensure that their internal procedures and training programs are updated accordingly.

[1]. The FSMA requires complainants to first file a complaint with the Occupational Safety and Health Administration (OSHA). If OSHA does not issue a decision within 210 days of the filing of the complaint, the complainant can then file a lawsuit in federal court. A complainant may also sue in federal court within 90 days of OSHA's determination.

National Law Review, Volume III, Number 218