Blowing the Whistle on Nuclear Safety Lapses:
Federal Whistleblower Protections Act At A Glance

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Following decades of opposition from environmental groups and communities concerned about the risks of nuclear power, the U.S. nuclear industry in mid-2007 is preparing for its largest expansion since the 1960s. Worry about oil shortages and global warming is prompting legislators and regulators to call for reducing the burning of fossil fuels and expanding the use of nuclear energy for production of electricity. Congress is considering loan guarantees and other measures that will make it easier for the industry to reach its goal of building some 28 new reactors in coming years.

If the industry's past is any guide to its future, the next ten years will see a growing number of safety problems as utilities rush to build and bring their plants online. From planning to construction, licensing, fueling and operation, each stage in the launching of a nuclear power plant generates countless safety issues, as licensees and their managers can be counted on to cut corners and overlook or hide serious problems at least some percentage of the time. Add to this the fact that some 150 aging reactors are already in use nationwide, and the scenario is nothing short of alarming.

The building of new reactors and the aging of existing ones means an increased responsibility for people who work in and around nuclear facilities, as their co-workers and communities will count on them to be on the lookout for violations of nuclear safety standards. As they have since the birth of the industry after World War II, these employees – from construction workers and plant operators to scientists, engineers and managers – will play a front-line position in the prevention of nuclear accidents that can pose significant danger to society.

The Energy Reorganization Act of 1978 (ERA)[2] provides strong protections for contractors and employees who provide information about, or participate in investigations

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[2] The text of the ERA's employee-protection provisions can be found on the website of the U.S. Department of Labor at http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/STATUTES/42U5851.HTM.

relating to, what they believe to be violations of nuclear safety laws and standards. The following overview gives these workers in the nuclear industry some of the information they need to know before blowing the whistle on nuclear safety issues.

Which Employees are Protected by the ERA?

The ERA protects "employees" against retaliation. The definition of “employee” is broad under the statute, and generally includes anyone who is employed by the licensee or its contractors or subcontractors. Even former employees can be protected where the employer's post-employment actions, such as providing a negative job reference, are related to or arise out of the former employment relationship. Depending on the extent of control that a covered employer exercises over a worker, the statue might protect the employee despite the fact that the employer calls him or her an "independent contractor."

Which Employers are Covered?

Since its enactment, the ERA has applied broadly to all licensees of the Nuclear Regulatory Commission (NRC), their subsidiaries and their contractors and subcontractors – in other words, to most any company that is involved in construction, maintenance, operation or clean-up at a nuclear facility. Congress extended the statute's coverage in August 2005 when it amended the ERA to protect employees of the NRC and Department of Energy (DOE) themselves, as well as their contractors and subcontractors. The law covers only "employers," and does not assign liability to individual managers even where they have spearheaded the retaliation against a complaining employee.

What Does the Whistleblower Have to Prove?

There are three central elements to an ERA whistleblower claim:

1) the employee is engaged in protected activity;
2) the employer took adverse employment action against the employee; and
3) the adverse employment action against the employee was caused at least in part by the protected activity.

What is Protected Activity?

An employee engages in “protected activity” when he or she raises concerns – internally or to regulators, and maybe even to the media – about issues of nuclear safety. An employee is protected only when complaining about practices that he or she reasonably believes to implicate nuclear safety, and not when complaining about myriad other issues. For example, an employee who reports a non-nuclear safety problem (e.g., a tripping hazard) is not protected by the ERA because the occupational-safety concern the employee is raising, however important, does not implicate nuclear safety. On the other hand, an employee who complains about the nuclear-safety impact of short staffing may be protected even though the employee is also concerned that a short staff simply means too much work for everyone. In the inherently hazardous context of

nuclear facilities, the DOL has found reports concerning a wider range of "quality-control" issues to merit whistleblower protection.

While the employee must reasonably believe the employer is engaged in conduct that will negatively impact on nuclear safety, he or she need not be right in that belief. As long as the employee's belief is reasonable, the employer cannot retaliate against the employee for speaking out, even if the belief ultimately proves to be wrong.

When Does an Employee Suffer an Adverse Employment Action?

The ERA prohibits an employer from taking "adverse employment action" against an employee for engaging in protected activity. To the extent that the DOL adopts the standard that the U.S. Supreme Court has established in a similar context, the DOL will consider an action "materially adverse" if it would dissuade a reasonable employee from raising concerns about practices that he or she believes to constitute fraud on shareholders. This would certainly include firings, demotions, cuts in pay or denial of promotions, but it could also include reassignment of job duties and responsibilities, assignment of undesirable shifts, harassment, micromanagement, excessive supervision, or exclusion from important company activities.

Was the Adverse Employment Action Causally Related to the Protected Activity?

In order to prove an ERA whistleblower claim, the employee need only show that the protected activity was a "contributing factor" in the employer's decision to take adverse action against the employee. The whistleblower's protected activity does not have to be the employer's sole reason or even a significant reason for the adverse action, but only has to play some role in the employer's decision, however minor.

Employees bringing actions under ERA may satisfy the "contributing factor" standard in either of two ways. In rare cases, the employee may be able to present what is called "direct evidence," such as the fact that the supervisor warned the employee that reporting a nuclear safety issue would result in discipline. More often, the employee will have to prove his or her case through circumstantial evidence, which may include the close timing between the protected activity and the adverse action, the fact that the employer has purportedly fired the employee based on conduct for which it has not disciplined other employees, the employer's history of retaliating against whistleblowers, or even the fact that the employer has failed to comply with its own procedures or has presented false reasons for its actions.

Procedures for Filing an ERA Whistleblower Claims

In order to pursue a whistleblower claim under the ERA, an employee must file a written complaint with any office of the Occupational Safety and Health Administration (“OSHA”), which is part of DOL, within 180 days of the retaliatory action. OSHA will conduct an investigation if it determines that the complaint contains the necessary elements of a claim, and will eventually issue a preliminary determination.

In the vast majority of cases, OSHA has come down on the side of the employer at this preliminary stage of the proceedings. Accordingly, an employee should not expect OSHA to find in his or her favor, and should plan instead on requesting a hearing before a DOL Administrative Law Judge (ALJ), which the employee must do within 30 days of receiving a negative determination from OSHA. The proceedings that follow are very similar to those in any court, except that the case is heard and decided by the judge rather than by a jury. Under a two year-old amendment to the ERA, the employee can withdraw his or her complaint from the DOL proceedings and re-file it in federal court if the DOL fails (as it almost always does) to render a final decision within one year of the date the employee first filed a complaint with OSHA. In either forum, the employee can engage in the full range of pre-trial discovery that is part of civil lawsuits, including obtaining relevant documents from the employer and taking depositions of the key decision-makers and other witnesses.

While the DOL process is not especially hospitable to employees, nuclear whistleblowers have won a significant number of cases at trials before the ALJs. In addition, a great many ERA cases have settled before trial, presumably with the employee walking away with an acceptable settlement amount. In fact, companies in the nuclear industry tend to settle ERA whistleblower complaints that have merit, regardless of which side would ultimately prevail in a DOL hearing. Nuclear companies know that allegations of lax nuclear safety practices, especially if true, can pose a serious risk to their reputation in a community that is likely to be already skeptical of its operations. If the employee's allegations are well-founded, many companies would rather settle a case promptly than run the risk of attracting prolonged attention to practices that might endanger the community.

What Remedies are Available to Successful Whistleblowers?

The Energy Reorganization Act entitles employees who prevail on their whistleblower claims to a full “make whole” remedy, which includes reinstatement and can include back pay and benefits, "front pay" for lost wages going forward, and compensatory damages for emotional pain and suffering. Employees who prevail in such proceedings may also recover their litigation costs, including attorneys’ fees.

How Do I Decide Whether and How to Report Unlawful Conduct?

Whether to report nuclear safety problems – and, if so, when, how and to whom – can be a very difficult decision for an employee, as blowing the whistle on an employer's unsafe practices can be a career-ending move. Even so, a strong sense of duty to co-workers and community compel many nuclear workers to speak out about unsafe practices every year.

While the decision to blow the whistle on lapses in nuclear safety should not be taken lightly and should be made only after seeking competent legal advice, the fact is that a large number of workers in the nuclear industry have spoken out and then achieved great outcomes when challenging their employers' retaliation. The Energy Reorganization Act provides strong

protections for nuclear workers, and there exist today a number of non-profit organizations that stand ready to support whistleblowers in the nuclear industry. The contact information for these groups, as well as other helpful information for would-be whistleblowers, can be found on the Katz, Marshall & Banks website at http://www.kmblegal.com/links.php.