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Protecting Workers In A Nuclear Renaissance

Law360, New York (May 29, 2009) -- With increased emphasis on reducing the energy industry's carbon footprint, U.S. public policymakers from across the political spectrum and industry advocates have, over the last few years, ushered in a "nuclear renaissance."

Nuclear energy is being touted as the only technology, other than hydroelectric power, capable of generating large volumes of energy without directly producing greenhouses gases.

Advocates of nuclear power claim that a new generation of reactors will produce relatively cheap electricity while solving the threat of global climate change.[1]

With the expansion of the nuclear energy industry and burgeoning mainstream acceptance of nuclear power as a viable alternative to burning fossil fuels and dependence on foreign oil, there will surely be a growing demand for skilled workers to build and operate the new reactors, as well as maintain the many older reactors whose licenses have been extended.

In this "nuclear renaissance," nuclear energy workers such as operators, plant managers, nuclear engineers, electricians, welders, pipe fitters and health physicists will be in high demand by the energy industry.

Also, as a result of the increased demand for nuclear energy, there is bound to be pressure to build and operate nuclear plants more quickly and cheaply, especially given the high costs of constructing the plants.[2]

If history tells us anything, these pressures will invariably lead to a "schedule over safety" culture in some plants in which nuclear power plant employees will be pressured to cut corners and overlook safety problems that may arise in the interest of keeping plants on-line and profits flowing to shareholders.

Nuclear workers, who serve as the de facto "eyes and ears" of the public, will be forced to make a difficult decision. They will have to decide whether and how vigorously they will blow the whistle on their employer's nuclear safety practices or be silent out of fear of losing their jobs.

As is the case with many nuclear power plant workers who have a legal duty to report nuclear safety concerns in order to protect the public health and safety, the choice to remain silent is not one available to them.

For example, section 206 of the Energy Act requires that nuclear power plant operators notify the NRC of any plant defect which rises to the level of a substantial safety hazard. See 42 U.S.C. § 5846 (a)(2). Also, Nuclear Regulatory Commission regulations outline requirements for emergency personnel to address safety issues at nuclear power plants. See 10 C.F.R. § 50.47.

It is crucial that these workers be fully aware of their rights under the law when they raise nuclear safety concerns and that management at nuclear power plants issue and adhere to zero tolerance policies that prohibit harassment, intimidation and other forms of retaliation made unlawful by the Energy Reorganization Act of 1974 (ERA).

U.S. Courts of Appeals in the majority of circuits have emphasized the importance of protecting nuclear workers from retaliation and have highlighted congressional intent to encourage nuclear industry employees to raise safety concerns without fear of reprisal.

For example, in Stone & Webster Engineering Corp. v. Herman, 115 F.3d 1568, 1569 (11th Cir. 1997), the court explained that "[a]mong the people best positioned to prevent fires [and other nuclear accidents] are the workers who tend to nuclear plants.

But if fear of retaliation kept workers from speaking out about possible hazards, nuclear safety would be jeopardized. To protect whistleblowers, Congress forbade employers from retaliating against employees who act in prescribed ways to ensure safety."

As the Sixth Circuit Court of Appeals noted, the purpose of the ERA is to "prevent employers from discouraging cooperation with NRC investigators, and not merely to prevent employers from inhibiting disclosure of particular facts or types of information." DeFord v. Sec'y of Labor, 700 F.2d 281, 286 (6th Cir. 1983).

Further courts have acknowledged that retaliation against whistleblowers "remain all too common in parts of the nuclear industry" and the protections of the ERA, "are intended to address those remaining pockets of resistance." Stone, 115 F.3d at 1572 (citing H. Rep. No. 102-474(VIII), at 79 (1992), reprinted in 1992 U.S.C.C.A.N. 1953, 2282, 2297; see Bricker v. Rockwell Int'l Corp., 22 F.3d 871, 876 (9th Cir. 1994) (citing same).

The Energy Reorganization Act

The ERA provides strong protections for employees who provide information about, or participate in investigations relating to, what they reasonably believe to be violations of nuclear safety laws and

standards.

The ERA applies to all licensees of the Nuclear Regulatory Commission (NRC), their subsidiaries and their contractors and subcontractors. This includes any company that is involved in construction, maintenance, operation or cleanup at a nuclear facility.

It should be noted that the ERA covers only "employers," and does not assign liability to individual managers even where they have spearheaded the retaliation against a complaining employee. The employee protection provision of the ERA states as follows:

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee):

A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.);

B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

E) testified or is about to testify in any such proceeding or;

F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

(2) For purposes of this section, the term "employer" includes:

A) a licensee of the commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. § 2021);

B) an applicant for a license from the commission or such an agreement state;

C) a contractor or subcontractor of such a licensee or applicant; and

D) a contractor or subcontractor of the U.S. Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344. 42 U.S.C. § 5851(a).

A Prima Facie Case of Retaliation Under the ERA

In order to establish a prima facie case of retaliation under the ERA, an employee must demonstrate that: 1) he engaged in protected activity; 2) the employer took an adverse employment action against him; and 3) the adverse employment action against the employee was caused at least in part by the protected activity.

An employee engages in "protected activity" when he or she raises concerns — whether internally or to regulators — about issues of nuclear safety. The employee's complaint need not be formal or in writing. An employee is protected when he has complained about practices that he reasonably believes relate to nuclear safety.

For example, an employee's complaint about racial or sexual harassment at a nuclear power plant involves non-nuclear safety problems that are covered by federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964, and not by the ERA.

Also, an employee's complaint about an occupational safety concern such as inadequate protective gear or a broken sprinkler system, despite its importance, may not be protected by the ERA unless such concerns expressly implicate radioactive matter.

However, an employee who complains about the company's failure to properly repair and maintain eroding metal tubes holding nuclear matter, for example, would be protected under the ERA as this concern directly impacts nuclear safety.

Additionally, an employee who complains about the impact of short staffing and failing quality control procedures on nuclear safety may be protected under the law because quality control issues can have a direct impact on the nuclear operations of a power plant.

While the employee must reasonably believe the employer is engaged in conduct that implicates nuclear safety, he need not be correct in that belief or be able to demonstrate that his nuclear safety concern is a valid one.

If the employee had a good-faith, reasonable belief that the employer's conduct was unlawful, the employer cannot retaliate against them for raising safety concerns, even if the belief ultimately proves to be wrong.

The ERA prohibits an employer from taking "adverse employment action" against an employee for engaging in protected activity.

The U.S. Department of Labor has adopted the broad definition of retaliatory acts that the U.S. Supreme Court established in Burlington Northern & Santa Fe Ry. Co. v. White, 126 S Ct. 2405, 2409 (June 22, 2006), which maintained that an action is materially adverse if it would dissuade a reasonable employee from making or supporting a charge of discrimination.

For nuclear workers, this would include firings, demotions, cut in pay or denial of promotions, reassignment of job duties and responsibilities, assignment of undesirable shifts, harassment, micromanagement, excessive supervision, or exclusion from important company activities.

Therefore, an employee who raises a nuclear safety concern and is subsequently ostracized from co-workers, is berated for speaking out or suddenly restricted from performing his or her job duties or is given menial tasks can demonstrate an adverse employment action by the company.

Further, in order to prove an ERA retaliation 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 employee’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 a role in the employer's decision.

Employees bringing actions under the ERA may demonstrate that their raising safety concerns was a “contributing factor” in the employer’s adverse action against them. 42 U.S.C.A. § 5851 (b)(3)(C).

The employee may be able to present “direct evidence” such as a statement by the supervisor warning 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 temporal proximity between the protected activity and the adverse action where the action follows closely on the heels of the protected activity.

The circumstantial evidence may also include disparate treatment such as the company disciplining the employee for conduct for which it has not disciplined other employees or the employer asserting pretextual reasons for its actions against the employee.

Procedure for Asserting an ERA Retaliation Claim and Remedies

In order to pursue a whistleblower claim under the ERA, within 180 days of the retaliatory action, an employee must file a written complaint with any office of the Occupational Safety and Health

Administration ("OSHA"), Department of Labor.

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.

If OSHA does not find in the employee's favor, he has 30 days from date of receipt of the negative determination to request a hearing before a DOL Administrative Law Judge ("ALJ").

The employee will then have the opportunity to 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.

After the ALJ hearing, the ALJ will issue a recommended opinion and order ("R. D. & O"). Either party has ten days to appeal this decision to the DOL's Administrative Review Board ("ARB"). If no petition is filed, the R. D. & O. becomes the final order of the DOL.

The ARB reviews cases de novo and its final decision is appealable to the U.S. Court of Appeals, as is the outcome of a federal district court trial. If the DOL fails to render a final decision within one year of the date the employee first filed a complaint with OSHA, the employee can withdraw his or her complaint from the DOL proceedings and refile it in the appropriate U.S. District Court.

The ERA entitles employees who prevail on their retaliation claims to reinstatement. Other remedies include back pay and benefits, front pay and compensatory damages for emotional pain and suffering.

Employees who prevail in such proceedings may also recover their litigation costs, including attorneys' fees. However, while the ERA generally provides a set of "make whole" remedies, it does not provide for punitive damages.

Conclusion

With this country's increased focus on nuclear power as a leading option for reducing the nation's carbon footprint and eliminating our dependence on foreign oil, nuclear workers on the ground will play a pivotal role in holding energy companies accountable for their actions.

Indeed, nuclear workers are often the conscience of the nuclear energy industry. Blowing the whistle on companies that fail to uphold their nuclear safety obligations can have grave consequences on the careers of nuclear workers but is absolutely necessary to protect public safety.

The ERA provides important protections for workers who have been retaliated against for raising nuclear safety concerns. Now it's up to the DOL to enforce the law.

--By Debra S. Katz (pictured) and Nicole J. Williams, Katz Marshall & Banks LLP

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The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.

[1] Portions of this article were previously published by the authors. See Nicole J. Williams & Debra Katz, Protect Nuclear Whistleblowers, The National Law Journal, May 18, 2009, at 34.

[2] Id. at 34.

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