

HEALTH REFORM IMPACT

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A New Wave of Whistleblowers?

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Whistleblower protection for employees has been expanded significantly under the new health reform legislation. The activities that will now enjoy “protected status” are broadly defined, and the potential remedies include a preliminary reinstatement order which could require the employer to reverse a termination and reinstate the employee pending the outcome of the claim. In addition, an employee cannot agree to arbitration of these claims – i.e., a mandatory arbitration agreement will not be effective in keeping these claims out of court. We anticipate that these new protections will lead to an increase in whistleblower claims.

The new protections appear in Section 1558 of the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act (collectively, the “Act”), which creates a new private right of action for retaliation, and in Section 6703 of the Act, entitled the Elder Justice Act of 2009, which sets forth reporting requirements and whistleblower protections for the employees of long-term care facilities. While the Elder Justice Act of 2009 is limited to a particular industry, Section 1558 has the potential to confer whistleblower protection on a broad range of employees across industry sectors.

Section 1558

The Act amends the Fair Labor Standards Act (“FLSA”) by adding Section 18C, which prohibits employers from discharging or in any manner discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment for several reasons, including the following:

(a) the employee reports a violation of Title I of the Act (or an act or omission which the employee reasonably believes to be a violation of Title I) to his or her employer, the federal government, or a state attorney general;

(b) the employee has or is going to testify, assist, or participate in a proceeding concerning a Title I violation; or

(c) the employee objected to, or refused to participate in, any act that the employee reasonably believed to be in violation of Title I.

Title I has a broad reach, applying in some manner to all employers regardless of size or industry sector. Thus, the whistleblower protections are likewise broad. Title I prohibits health plans from establishing lifetime or annual limits on the dollar value of benefits provided, requires plans to cover

certain preventive services and immunizations, and prevents plans from imposing coverage exclusions based on pre-existing conditions.

Title I also prohibits all employers from discriminating in favor of highly compensated employees with respect to health insurance coverage eligibility for plan years beginning six months after passage of the Act. Beginning in March 2013, all employers subject to FLSA – essentially all employers – must notify each new employee at the time of hire and every current employee that health insurance is available through the health insurance exchanges created under the Act. Beginning in 2014, employers of a certain size are required to offer certain “minimum essential” health insurance coverage to employees or face fines, and still larger employers will be required to automatically enroll employees in the plans that it offers. Additional reporting requirements will also be in place related to the health insurance provided by employers.

Employee retaliatory discharge claims brought under Section 1558 will follow the “procedures, notifications, burdens of proof, remedies and statutes of limitation” set forth in the Consumer Product Safety Improvement Act's whistleblower provision. The employee has 180 days after becoming aware of the alleged retaliation to file a complaint with the Occupational Safety and Health Administration (“OSHA”). OSHA will then conduct an investigation. If OSHA finds reasonable cause to believe that a violation has occurred, it will issue a preliminary order. The preliminary order may provide for preliminary relief, including reinstatement, compensatory damages, and injunctive relief.

Following the issuance of the preliminary order, the parties have 30 days to file objections to the order and request a hearing. The filing of an objection does not stay any reinstatement remedy provided for in the preliminary order. This is a fairly extraordinary result in that an employer may be ordered to reinstate an employee who has brought a Section 1558 claim without any hearing having taken place. If there is no objection, the preliminary order (along with the preliminary relief granted) will become a final order that is not subject to judicial review. If an objection is filed, a Department of Labor (“DOL”) administrative law judge (“ALJ”) will conduct a hearing. No later than 120 days after the hearing is concluded, the Secretary of Labor must issue a final order either dismissing the complaint or granting the relief described above.

There are two ways to obtain judicial review of a final order under Section 1558. Within 60 days of a final order, a party may petition for review with the United States Court of Appeals for the circuit in which the alleged violation occurred. On the other hand, if the Secretary failed to issue a final order within 210 days of the complaint or within 90 days after a written determination, the employee may file a lawsuit in federal court. The remedies available in a Section 1558 civil action include reinstatement, back pay with interest, attorneys' fees, costs, expert witness fees, and compensatory damages. Section 1558 also provides that a mandatory arbitration agreement is not effective to force an employee to arbitrate these whistleblower claims.

The burdens of proof in Section 1558 litigation are pro-employee. The complainant can prevail by showing that the protected activity was merely a contributing factor in the employer's adverse action. The protected activity does not have to be the sole factor, or even a substantial contributing factor, in the adverse action. Plus, the employer can avoid liability only if it can prove by clear and convincing evidence (as opposed to “preponderance of the evidence” – the burden on the employee) that the employer would have taken the same action regardless of the employee's protected activity. The satisfaction of this burden acts as a complete defense to liability for the employer.

Section 6703(b)(3) – The Elder Justice Act of 2009

Section 6703(b)(3) imposes reporting requirements on the owners, operators, employees, managers, agents, and contractors (collectively, “covered individual”) of a long-term care facility that received at least \$10,000 of federal funding under the Social Security Act in the preceding year. Generally, covered

individuals must report to at least one local law enforcement agency and the Secretary of the U.S. Department of Health and Human Services “any reasonable suspicion of a crime” against a resident or patient of the long-term care facility. If the suspected crime causes serious bodily injury, it must be reported no later than two hours after the covered individual forms a suspicion. All other suspected crimes must be reported no later than 24 hours after the suspicion is formed.

If a covered individual fails to timely report a suspicion of a crime, the individual may be subject to a civil fine of up to \$200,000 (\$300,000 if violation “exacerbates the harm to the victim of the crime or results in harm to another individual”). To better ensure compliance, long-term care facilities are required to notify covered individuals annually of their duty to report and must post a notice in the workplace specifying the rights of employees under Section 6703.

Section 6703(b)(3) also includes a retaliation provision which prohibits long-term care facilities from discriminating against an employee for “lawful acts done by the employee,” which include complying with the reporting requirements described above. Prohibited retaliatory conduct includes discharging, demoting, suspending, threatening, harassing or in any other manner discriminating against an employee in the terms and conditions of employment. Long-term care facilities that violate this provision face civil fines of up to \$200,000.

As employers scramble to digest and comply with the various requirements of the Act, it is important not to overlook these whistleblower provisions. Employers should consider educating their management on the types of employee activities that are protected and the proper ways in which to respond to protected activity. The development and implementation of procedures for properly handling employee complaints will be of great assistance in avoiding whistleblower claims.

If you have questions about this alert, please call one of our labor attorneys listed below.

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