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EMPLOYMENT LAW BRIEF

Summer 2010

HEALTH CARE REFORM LAW: WHISTLEBLOWER PROTECTIONS

There has been so much coverage of the new health care reform that many employers are struggling to understand its practical implications for their business. One area that has not been discussed in depth but which will affect all employers is the development of another protected class of employees.

Section 1558 of the Patient Protection and Affordable Care Act amends the Fair Labor Standards Act to prohibit employers from retaliating against employees who apply for health benefit subsidies or who receive tax credits under the health reform law. There are also provisions in the law protecting employees who provide information or testimony about possible employer violations of Title I of the law. Title I contains the requirements governing health insurance including prohibitions against denying coverage based upon preexisting conditions and policy and financial reporting requirements. OSHA has been given responsibility for the investigation of complaints and can even order preliminary reinstatement. Complainants are entitled to a federal court jury trial and may be entitled to remedies such as reinstatement, back pay, special damages and attorney's fees.

The burden of proof for Section 1558 claims is very favorable for the employee. A complainant must prove by a preponderance of the evidence that the complainant's protected activity was a contributing factor in the employer's adverse employment action. If the complainant meets his burden, then the employer must prove by clear and convincing evidence that it would have taken the same action in the absence of the protected conduct.

Section 6703(b)(3) of the law protects employees of federally funded long-term care facilities. Any long-term care facility that receives more than \$10,000 in federal funds must notify all officers, employees, managers, and contractors of the facility that they are required by law to report any reasonable suspicion of a crime to at least one law enforcement agency. Failure to report a crime exposes an individual to civil fines up to \$200,000. In furtherance of this duty to report, the law prohibits a facility from retaliating against an employee because of lawful actions taken by the employee, which would include making a report. Violations of the anti-retaliation provision can result in fines up to \$200,000 and exclusion from federal programs for up to two years.

States will now be required to make available federally prescribed standardized complaint forms for residents of skilled nursing facilities and persons acting on behalf of residents. States must establish a complaint resolution process to track and investigate complaints and ensure that skilled nursing facilities do not retaliate against complainants. In such a case, a complainant could possibly be an employee. Provisions have also been added that expand the definition of an "original source" under the False Claims Act to include an "individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section."

This article is a summary of the newly enacted provisions. As regulations are issued more guidance will be provided for employers. However, as attorneys' fees are expressly included in the available remedies be assured that plaintiff attorneys will be looking for ways to test the law.