

Whistleblower Provisions in the Patient Protection and Affordable Care Act

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Continuing its recent trend of inserting whistleblower protections in significant legislation that impacts public health and safety, Congress included whistleblower and retaliation protections in the recently-enacted Patient Protection and Affordable Care Act ("PPACA"), the comprehensive health care legislation signed by President Obama in March 2010. While the whistleblower provisions may encourage employees to report fraud or waste under the statute, they may also impose added burdens on employers, health insurers and other entities involved in the health care field as all parties affected by the PPACA seek to understand and implement the many requirements imposed by statute.

The PPACA clearly showed an intent by Congress to extend whistleblower protection to those who report abuses or fraudulent conduct in the delivery of health care through the use of public monies. Section 1558 of the PPACA amends the Fair Labor Standards Act of 1938 ("FSLA") by adding Section 18C, which provides that an employer cannot discriminate "against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment" because the employee, among other things

1. provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to the violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title
2. actually did or is about to assist, participate, or testify in a proceeding about such violation, or
3. objected to or refused to participate in any activity or task that the employee "reasonably believed" to be in violation of the statute or any rule or regulation promulgated under the statute.

See also Section 2706(b) of the PPACA (Section 1558 applies to any group health plan or health insurance officer offering group or individual health insurance coverage).

Any employee who believes that he or she has been discharged or discriminated against in violation of Section 18C of the FSLA is entitled to seek relief using the same procedures provided in 15 U.S.C. §2087(b), which contains the extensive whistleblower protections contained in the Consumer Product Safety Improvement Act of 2008. These procedures include filing a complaint concerning discrimination or retaliation with the Department of Labor, going through an administrative process to determine whether the employee's conduct protected by Section 18C was "a contributing factor in the unfavorable personnel action" alleged by the employee, and providing for the filing of a civil action in federal court after exhaustion of the administrative process.

Interestingly, however, Section 1558 explicitly limits application of Section 18C *only* to violations of Title I of the PPACA. Title I covers the statute's core provisions for medical care in conventional settings, such as the provision of health care services at hospitals, clinics and physician offices; hence, employees who report

fraud, waste or violations in those settings fall under the protections afforded by Section 1558. Individuals who report violations of Titles II through X of the PPACA, however, fall outside the protections under Section 1558. Individuals involved in the following areas, therefore, fall outside Section 1558: administration of Medicare and Children's Health Insurance Program (CHIP) expansion; Medicaid, Medicare and CHIP program integrity; nursing home care for the elderly; innovative treatment and therapies; payments and reimbursements (though not through the state Exchanges set up under the statute); prescription drugs and preventative care; house-call visits; expansion of and increasing in training for the health care workforce; and grants for the expansion of health care to under-served populations. The lack of whistleblower protections for these matters may result in individuals being unwilling to report abuses or fraud under the PPACA when encountered in those areas.

Finally, Section 1313 of the PPACA makes any "[p]ayments made by, through or in connection with an Exchange" subject to the False Claims Act, 31 U.S.C. 3729, *et seq.*, if the payments involve any Federal funds. The False Claims Act prohibits the "knowing" presentation of a false or fraudulent claim for approval or payment; hence, any "knowing" presentation of a bill or invoice for health care services through an Exchange set up under the PPACA that contains overcharges is subject to a civil penalty. The penalties include a fine of up to \$10,000, a civil penalty of between 3 to 6 times the amount of the overcharge, and repayment of the cost to the Federal government of bringing the civil action to prove the violation. Note that Section 1313 contains the threat of a civil penalty up to 6 times the amount of damages sustained by the Federal government as a result of a violation, which is twice as high as the maximum available under the False Claims Act. Coupled with the whistleblower provisions contained in Medicare and Medicaid statutes, any payment for health care services that involves Federal funds could be expected to be subject to the protection of a whistleblower provision.

As all stakeholders in the health care arena seek to implement the provisions of the PPACA, employers and employees need to be aware that those who report abuses or fraud under the new statute will have powerful whistleblower protections available, at least in the traditional health care settings.