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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@portfoliomedia.com

Whistleblower Protections Under Health Care Bill

Law360, New York (April 08, 2010) -- To further the goal of rooting out fraud, waste and abuse in health care, The Patient Protection and Affordable Care Act of 2009[1] ("Act") that President Barack Obama signed into law on March 23, 2010, includes several whistleblower provisions, including a new private right of action for retaliation (Section 1558), reporting requirements designed to prevent abuse of patients in elder care facilities (Section 6703(b)(3)), mandatory implementation of a complaint resolution process for residents and persons acting on behalf of residents at skilled nursing facilities (Section 6105), and a new definition of an "original source" under the False Claims Act that is favorable to qui tam relators (Section 10104(j)(2)).

Prohibition Against Whistleblower Retaliation (Section 1558)[2]

Section 1558 prohibits retaliation against an employee who provides or is about to provide to an employer, the Federal Government, or a state Attorney General, information that the employee reasonably believes to be a violation of Title I of the Act.

This provision also protects individuals who participate in investigations or object to or refuse to participate in any activity that the employee reasonably believes to be a violation of Title I.

Title I covers a broad range of topics and therefore the scope of protected conduct will be broad, including disclosures related to the denial of coverage based upon a preexisting condition, disclosures concerning discrimination based upon an individual's receipt of health insurance subsidies, or disclosures about the failure of an insurer to rebate portions of excess premiums.

Section 1558 incorporates the procedures, burden-shifting framework, remedies and statute of limitations set forth in the whistleblower protection provision of the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. 2087(b), including the following:

Broad Scope of Prohibited Retaliation

An employer is prohibited from discharging or "in any manner discriminate[ing] against any employee with respect to his or her compensation, terms, conditions, or other privileges of

employment."[3]

The U.S. Department of Labor's Administrative Review Board (ARB) applies the Burlington Northern[4] standard to analogous whistleblower protection statutes,[5] and therefore Section 1558 will prohibit not only tangible adverse actions, but also any action that may dissuade a reasonable employee from engaging in further protected activity.

Prohibited acts of retaliation will likely include termination, suspension, demotion, reduction in pay, demotion, failure to promote, failure to hire, diminution in job duties and blacklisting.

Employee-Favorable Causation Standard and Burden-Shifting Framework

A complainant can prevail merely by showing by a preponderance of the evidence that her protected activity was a contributing factor in the unfavorable action.[6] A contributing factor is any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.[7]

Once a complainant meets her burden by a preponderance of the evidence, the employer can avoid liability only if it proves by clear and convincing evidence that it would have taken the same action in the absence of the employee's protected conduct.[8] Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain."[9]

A Reasonable but Mistaken Belief is Protected

A Section 1558 complainant need not demonstrate that she disclosed an actual violation of Title I. Instead, Section 1558 employs a "reasonable belief" standard that the DOL and federal courts have construed as protecting a reasonable but mistaken belief that an employer may have violated a particular law.[10]

The reasonable belief standard consists of both a subjective and objective component, and objective reasonableness "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee."[11]

Administrative Exhaustion Requirement

The complaint must be filed with the Occupational Safety and Health Administration within 180 days of the employee becoming aware of the retaliatory adverse action. OSHA will investigate the claim and can order preliminary relief, including reinstatement.

Either party can appeal OSHA's determination by requesting a de novo hearing before a DOL ALJ, but objecting to an order of preliminary relief will not stay the order of reinstatement. Discovery

before an ALJ typically proceeds at a faster pace than discovery in state or federal court, and the hearings are less formal than federal court trials.

For example, ALJs are not required to apply the Federal Rules of Evidence. Either party can appeal an ALJ's decision to the ARB and can appeal an ARB decision to the circuit court of appeals in which the adverse action took place.

Option to Remove Claim to Federal Court and Right to a Jury Trial

If the Secretary of Labor fails to issue a final decision within 210 days of the filing of a complaint, or within 90 days after receiving a written determination from OSHA, the complainant can remove her claim to federal court for de novo review and either party may request a trial by jury.[12]

Remedies

Remedies include reinstatement, back pay with interest, "special damages," attorney's fees, litigation costs, and expert witness fees.[13] Where reinstatement is unavailable or impractical, front pay may be awarded. "Special damages" has been construed under similar whistleblower protection statutes to include damages for pain, suffering, mental anguish and career damage.[14]

A complainant may also be entitled to damages for loss to their reputation as part of the "make whole" remedy provided by the statute.[15]

Mandatory Arbitration Agreements Inapplicable

Section 1558 claims are exempted from mandatory arbitration: "The rights and remedies in this section may not be waived by any agreement, policy, form or condition of employment."[16]

Broadened Definition of the Original Source Exception to the False Claims Act's Public Disclosure Bar (Section 10104(j)(2))

Section 10104(j)(2) amends the False Claims Act (FCA) by broadening the original source exception to the public disclosure bar.

Effective March 23, 2010, an "original source" is an "individual who either (1) prior to a public disclosure ... 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."

Significantly, the public disclosure bar is no longer jurisdictional in that the Government can pursue an FCA action where the relator does not qualify as an original source.[17]

Until recently, it was unsettled whether the public disclosure bar contained in 31 U.S.C. § 3730(e)(4)(A) applies to disclosures at all levels of government or only to disclosures in federal hearings or in which the Government is a party.[18]

Just last week, the Supreme Court held in Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson,[19] that a relator could not maintain her qui tam action where the suit was based in part on information contained in county and state administrative reports.

While not retroactive, the amended definition of an "original source" ensures that the court's expansive construction of the public disclosure bar does not impact future qui tam actions.

The basic purpose of the public disclosure bar, i.e., preventing parasitic qui tam actions based on public disclosures, is not altered, but it will be easier to meet the original source exception to the public disclosure bar.

Combined with recent amendments to the FCA in the Fraud Enforcement and Recovery Act of 2009, signed into law on May 20, 2009, and increased resources for the U.S. Department of Justice to prosecute health care fraud, the qui tam provision of the FCA will continue to be a potent tool to combat contractor fraud.

Indeed, according to Taxpayers Against Fraud, 80 percent of the FCA cases that are now pursued by the U.S. Department of Justice are initiated by whistleblowers and since 1986, FCA judgments and settlements against fraud feasors have totaled over $20 billion.[20]

Reporting Requirements for Employees of Federally Funded Long-Term Care Facilities (Section 6703(b)(3))

The Elder Justice Act of 2009[21] requires long-term care facilities that receive more than $10,000 in federal funding in the preceding year to notify all officers, employees, managers and contractors that they are required by law to report any reasonable suspicion of a crime committed "against any individual who is a resident of, or is receiving care from the facility" to the Secretary of the U.S. Department of Health and Human Services and one or more local law enforcement agency.

If the events that raise suspicion result in serious bodily injury, the suspected crime must be reported immediately and not more than "2 hours after forming the suspicion." All other suspected crimes must be reported within 24 hours.

Failure to report a suspected crime can expose an employee, manager, or contractor to civil fines of up to $300,000. In addition, the Elder Justice Act prohibits retaliation against an employee "because of lawful acts done by the employee."

Prohibited retaliation includes filing a complaint or report against an individual with a state professional disciplinary agency. Facilities violating the anti-retaliation provision may be subject to a fine of up to $200,000 and exclusion from federal programs for a period up to two years.

Mandatory Complaint Resolution Process for Skilled Nursing Facilities (Section 6105)

Effective March 23, 2011, Section 6105 requires states to make available federally prescribed standardized complaint forms for residents and persons acting on the behalf of residents of skilled nursing facilities.

In addition, states must establish a complaint resolution process to track and investigate complaints at skilled nursing facilities and to ensure that complainants are not subjected to retaliation.

--By Jason M. Zuckerman (pictured) and R. Scott Oswald, The Employment Law Group

Jason Zuckerman and R. Scott Oswald are principals at The Employment Law Group in Washington, D.C., where they litigate whistleblower retaliation claims, qui tam actions and other employment-related claims on behalf of employees.

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

[1] Patient Protection and Affordable Care Act of 2009, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[2] Patient Protection and Affordable Care Act § 1558 (to be codified in a newly created subsection of the Fair Labor Standards Act).

[3] Id. § 1558

[4] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

[5] Melton v. Yellow Transp. Inc., ARB No. 06-052, ALJ No. 2005-STA-02 (ARB Sept. 30, 2008).

[6] 15 U.S.C. §§ 2087(b)(2)(B)(i)-(iii).

[7] Klopfenstein v. PPC Flow Technologies Holdings Inc., ARB No. 04-149 at 18, ALJ No. 2004-SOX-11 (ARB May 31, 2006).

[8] 15 U.S.C. § 2087(b)(2)(B)(iv)

[9] Peck v. Safe Air Int'l Inc., ARB No. 02-028 at 9, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

[10] See Van Asdale v. Int'l Game Tech., 577 F.3d 989, 1001 (9th Cir. 2009) ("to encourage disclosure, Congress chose statutory language which ensures that an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected."); Allen v. Admin. Review Bd., 514 F. 3d 468, 477 (5th Cir. 2008) (applying "reasonable belief" standard in a Sarbanes-Oxley whistleblower retaliation action); Kalkunte v. DVI Fin. Svcs., Inc., ARB Nos. 05-139 & 05-140, 2004-SOX-056 (ARB Feb. 27, 2009) (clarifying that a reasonable but mistaken belief is protected under SOX).

[11] Allen, 514 F.3d at 477.

[12] 15 U.S.C. § 2087(b)(4).

[13] Id.

[14] Kalkunte, ARB Nos. 05-139 & 05-140 at 15 (Sarbanes-Oxley case in which complainant obtained emotional distress damages); Hannah v. WCI Communities, 348 F. Supp. 2d 1332, 1334 (S.D. Fla. 2004) ("a successful Sarbanes-Oxley Act plaintiff cannot be made whole without being compensated for damages for reputational injury that diminished plaintiff's future earning capacity").

[15] Hannah, 348 F. Supp. 2d at 1334.

[16] Patient Protection and Affordable Care Act § 1558.

[17] Patient Protection and Affordable Care Act § 10104(j)(2).

[18] 31 U.S.C. § 3730(e)(4)(A) deprived any federal court of jurisdiction to hear a qui tam action based on information publicly disclosed "in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation ..." Circuits were split as to whether this applied only to federal proceedings or at the state and local level as well. Compare U.S. ex rel. Dunleavy v. County of Del., 123 F.3d 734 (3d Cir. 1997) (county reports did not violate the public disclosure bar.) and U.S. ex rel. Bly-Magee v. Premo, 470 F.3d 914 (9th Cir. 2006) (public disclosure bar precluded FCA claim based upon information contained in a state report).

[19] Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, __ S. Ct. __, 2010 WL 1189557 (Mar. 30, 2010)

[20] See Taxpayers Against Fraud website, www.taf.org.

[21] The Elder Justice Act is subtitle H of the Patient Protection and Affordable Care Act of 2009.