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The Affordable Care Act includes broad whistleblower protections for employees who report violations of requirements to provide preventive services, prohibitions on lifetime limits and preexisting condition exclusions, and other aspects of ACA. In 2014, antiretaliation provisions will also apply to group health plans and health insurance issuers.

ACA Expands Employee Protection for Blowing the Whistle

by Denise M. Keyser and Mark F. Kowal

“Whistleblowing” provisions are common in federal and state legislation. Many recent laws include protection against workplace retaliation for those who “blow the whistle” on employer fraud or other illegal actions.

Such statutes and who they protect include the familiar Occupational Safety and Health (OSH) Act, employees who report workplace safety violations¹; the Sarbanes-Oxley Act (SOX), employees who report alleged mail, wire, bank or securities fraud²; and the Consumer Financial Protection Act³, for reporting violations of Dodd-Frank or similar laws, as well as the lesser known Asbestos Hazard Emergency Response Act, violations of the law relating to asbestos in schools⁴; and the Moving Ahead for Progress in the Twenty-First Century Act, information about motor vehicle defects.⁵

Often overlooked on this list is the Patient Protection and Affordable Care Act (ACA).⁶

As the 2014 implementation date for many of ACA’s most controversial provisions draws near, most businesses are fo-

cused on ensuring that their group health plans meet the new law’s requirements. The public’s attention, as well, has been elsewhere, centered largely on the creation of health care exchanges, mandated changes to employer-sponsored health plans, wellness initiatives and the “pay or play” penalties.

ACA’s whistleblower protections currently are flying under the radar. If recent trends continue, these provisions will garner more attention once “Obamacare” becomes fully effective, for retaliation has become one of the most popular causes of action both before various government agencies and in the courts.

For example, for fiscal year 2012, over 37,000 retaliation claims were filed with the Equal Employment Opportunity Commission (EEOC) under the many federal antidiscrimination laws that the agency enforces, making retaliation the most frequently filed EEOC claim for the last four years.⁷ And it isn’t just the sheer number of claims that have businesses worried; these cases have the potential to result in substantial

jury awards. A recent study published by Thomson-Reuters found that the median whistleblower award, for 2005-2011, stood at \$218,921 while the mean award topped \$750,000.⁸

As businesses struggle to comply with health care reform, there should be little doubt that retaliation claims under ACA will create a new headache for many employers and insurers.

ACA's Whistleblower Provisions

ACA's whistleblower protections are broad, forbidding discrimination against any employee with respect to "compensation, terms, conditions or other privileges of employment" because that employee (1) reports a violation of ACA's Title I (which includes requirements to cover preventive services and prohibits lifetime coverage limits, preexisting condition exclusions and the use of certain factors to set rates); (2) refuses to participate in an activity the employee reasonably believes violates Title I; (3) assists/participates in a whistleblower proceeding under ACA; or (4) receives a tax credit or cost-sharing reduction as a result of participation in a health insurance exchange, or marketplace.

In 2014, these antiretaliation provisions will be expanded to apply to group health plans and health insurance issuers offering group or individual health insurance coverage. Insurance providers will be prohibited from retaliating against individuals who are not their own employees. Thus, for example, an insurance provider will be barred from canceling or limiting a whistleblowing individual's health insurance coverage.

OSHA's Whistleblower Protection Program

ACA's whistleblower provisions will be enforced by the Occupational Safety and Health Administration (OSHA), an agency best known for administering the federal workplace safety law. While OSHA may seem an odd choice, it already enforces the antiretaliation provisions of 20 other laws, including OSH Act and SOX.

OSHA recently launched several enforcement initiatives that included overhauling its Whistleblower Protection Program after audits by the General Accounting Office concluded that the program was riddled with problems and woefully ineffective. In response, OSHA generated a string of systemic changes to the program that reflect the agency's increased vigor under the Obama administration and its commitment to protecting, in the words of Dr. David Michaels, OSHA's assistant secretary, "[t]he ability of workers to speak out and exercise their legal rights without fear of retaliation."

Consequently, in August 2011, OSHA released a new edition of its *Whistleblower Investigations Manual*, which provides internal guidance for its investigators in handling

retaliation complaints under the various whistleblower statutes delegated to OSHA. Key changes include (1) the requirement that investigators attempt to interview the complainant in every case; (2) clarification that complaints may be filed orally or in writing, in any language, and electronically (via the Whistleblower Protection website, www.whistleblower.gov); and (3) expanded advice on handling uncooperative respondents and the use of administrative subpoenas to obtain needed evidence from them. These changes are expected to make it easier for employees to file complaints and more likely that those complaints will be thoroughly investigated.

The Whistleblower Protection Program now reports directly to the Office of the Assistant Secretary—a move that the U.S. Department of Labor has described as reflecting "a significantly elevated priority status for whistleblower enforcement." Accordingly, OSHA has been provided with the tools to act on its enforcement priorities and, over the past two years, has added a significant number of investigators and staff, increased its emphasis on investigator training and strengthened its internal audit program.

Complaint Procedure and Enforcement

On February 22, 2013, OSHA addressed the newest law to come within its purview and issued an interim final rule establishing procedures and time frames for ACA retaliation complaints.⁹

At the time of this writing, the public comment period on the rule was scheduled to end on April 29, 2013. The rule is "complainant friendly." Specifically:

- An individual who believes he or she has been the victim of retaliation may file a complaint with OSHA within 180 days of the claimed retaliation. No specific form is required; the ACA complaint simply must alert OSHA to the allegation of retaliation. OSHA may then choose to conduct a full investigation. Thereafter, under the rule, OSHA would have the power to award damages and other remedies, including reinstatement of employment. The agency also has the option to attempt to negotiate an amicable resolution.
- Parties that disagree with an agency order may appeal administratively and, ultimately, to the appropriate federal appeals court. Although an appeal will stay the entry of most relief, it will not stay an order of reinstatement. Thus, an employer may be required to re-employ an alleged whistleblower during what could be an extended appeal process.
- A complainant need not remain at OSHA. If the agency does not take prompt action (within 210 days),

the complaining individual may go directly to federal court. And if OSHA does not enter an order on its findings within 90 days (presumably because the agency is attempting to resolve the matter amicably), the individual may choose not to wait for an order and, again, may go directly to court.

- The burden of proof is relatively light for the complainant, who must demonstrate, by a preponderance of the evidence, direct or *circumstantial*, only that the protected activity was a motivating factor (not *the* motivating factor) in the alleged retaliatory action. The respondent (employer or insurance provider) then has the burden to show, by clear and convincing evidence (a higher standard of proof), that the business would have taken the same action notwithstanding the protected activity. Thus, if the rule becomes final in its current form, businesses will find it more difficult to defend ACA claims as compared to many employment cases, which do not all place such a heavy burden on the defense.

Protecting Businesses Against Whistleblower Claims

With the specter of increased OSHA scrutiny, it makes sense for businesses to minimize the chances that employees (and covered individuals) will raise whistleblowing claims under ACA—or any other antiretaliation law—and maximize the chances that any such claims are raised and resolved in-house and without outside intervention.

With that goal in mind, here are six steps that can be taken now to create and sustain a corporate culture of compliance:

1. Make compliance a strategic pri-

ority, and engage the board of directors and senior management in policy statements and actions that identify ethics and legal compliance as a business priority.

2. Implement and distribute a corporate code of ethics that makes this commitment explicit.
3. Include a well-publicized and effective complaint procedure. Consider reissuing the code of ethics and the complaint procedure annually and having employees formally acknowledge that they have read and understand the policies. Include the option to make anonymous complaints via a hotline or similar process.
4. Many businesses now conduct antiharassment training on a periodic basis. Consider similar training on the code of ethics and complaint procedure.
5. Train supervisory staff. No matter how committed a business may be with respect to its antiretaliation policies, it will be only as successful as its people permit. Management should receive training in recognizing and responding to claims of unlawful conduct or retaliation. Managers and supervisors must understand what constitutes retaliation, how difficult those claims can be to defend and the potential liability they carry.
6. Consider appointing an ombudsman, especially if the company has had prior problems with whistleblowers and/or has a relatively weak or inexperienced management team. The ombudsman should be a clear alternative to lodging a complaint through the general chain of command. Thus, the ombudsman should be separate from the human re-

sources department and should be an individual with experience in internal investigations as well as a knack for dealing with the entire range of company employees. The ombudsman should have sufficient “clout” to enforce the no-retaliation pledge and to resolve complaints effectively.

Dealing With a Whistleblower

What if, despite an employer’s best efforts, a whistleblower claim is brought, either internally or externally? A business must proceed with care if the complaining worker is still employed.

While ACA forbids retaliation in the form of any adverse employment action, this does not mean that a complaining employee is “bulletproof.” An employer may discipline and/or discharge a worker who has made a complaint but must be prepared to show by “clear and convincing evidence” that it would have done the same thing even absent the protected activity. Before any action is taken against the whistleblower, an employer should review its file carefully, ensuring proper documentation exists to support the action and that the employee is being treated consistently with company policy, past practice and comparable workers. A similar analysis applies to claims brought against insurance providers by covered individuals.

Several recent whistleblower cases are instructive on just how difficult it can be to manage employees who have made a legally protected complaint. Although these cases did not arise under ACA, they warn that seemingly “no-brainer” discharge decisions can become “close calls” when the employee has participated in protected activity.

In *Coleman v. Donahoe*,¹⁰ the African-American plaintiff made complaints of unlawful discrimination

against her white supervisor at the U.S. Postal Service. She then took a medical leave necessitated by psychiatric problems. While on leave, she told a psychiatrist that she had homicidal thoughts about the supervisor. This was reported to the supervisor who, in turn, reported it to the police. At about the same time, the plaintiff filed two EEOC charges. She was thereafter discharged for her threats. In a lawsuit alleging retaliation for filing the charges, an appeals court reversed judgment for the employer, essentially because the Postal Service had suspended but not discharged two white workers who had threatened an African-American employee, the plaintiff's threat was not judged to be a "true threat," and the close timing between the plaintiff's complaints of discrimination and her discharge suggested retaliation.

In *Smith v. Xerox Corp.*,¹¹ a different federal appeals court concluded that the employee presented enough evidence of retaliation to sustain a verdict in her favor. Here, the employee had received positive evaluations for much of her employ-

ment but, after realignment of sales territories, her performance declined and she was put on a 90-day performance improvement plan, which was followed by 60 days' probation and discharge. She sued, alleging retaliation for having filed a charge with EEOC. On appeal, the court upheld a jury verdict for her because, among other things, her supervisor was a difficult manager who did not like employees who "stood up" to him and especially did not like the plaintiff (this supported the inference that the manager was the sort of person who would engage in retaliation); Xerox's policies called for counseling and coaching before formal warnings; the termination process started just days after the employee filed her EEOC charge and before the expiration of probation; and, just weeks after she filed the charges, her manager wrote her up over two trivial issues, without getting her side of the story.

As these cases and the statistics cited earlier in this article illustrate, retaliation cases are on the rise, and have real "jury appeal." Liability can be substantial. A successful plaintiff is not limited simply to economic damages such as back pay, "front pay" and lost benefits. Under ACA, a successful retaliation plaintiff, in addition to these damages, is entitled to reinstatement and may recover his or her attorney fees and costs.¹²

Thus, as 2014 approaches, employers, insurance carriers and group health plans must be prepared for ACA whistleblower claims and should implement policies now that will minimize the potential for significant liability down the road.

Endnotes

1. 29 U.S.C. §660(c).
2. 18 U.S.C. §1514A.
3. 12 U.S.C. §5567.
4. 15 U.S.C. §2651.
5. 49 U.S.C. §30171.
6. 42 U.S.C. §18001 et seq.
7. U.S. Equal Employment Opportunity Commission Charge Statistics FY 1997 Through FY 2012, available at www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm, last visited April 2, 2013.
8. *Employment Practice Liability: Jury Award Trends and Statistics* (2012-13 Ed.).
9. Procedures for the Handling of Retaliation Complaints under Section 1558 of the Affordable Care Act, Fed. Reg. 78, 25 (Feb. 6, 2013) (to be codified at 29 C.F.R. pt.1986).
10. 667 F.3d 837 (7th Cir. 2012).
11. 371 Fed. Appx. 514 (5th Cir. Mar. 2010) and 602 F.3d 320 (5th Cir. 2010).
12. See the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 §1558 (2010); see also 21 U.S.C. §218C; see also 15 U.S.C. §2087(b).

<< bios



Denise M. Keyser is a partner at Ballard Spahr LLP in Cherry Hill, New Jersey. She has 30 years of experience representing national, regional and locally based businesses in labor and employment matters including whistleblower/retaliation lawsuits under various state and federal laws, traditional labor law (such as collective bargaining and arbitrations), OSHA, ERISA, wage and hour, wrongful discharge, discrimination management training, executive compensation and affirmative action. Keyser holds a B.A. degree from State University of New York at Stony Brook and earned a J.D. degree from the University of Pennsylvania Law School.



Mark F. Kowal is an associate in the Labor and Employment Group at Ballard Spahr LLP in Cherry Hill, New Jersey and focuses his practice on defense of employment discrimination and retaliation claims. He earned a B.S. degree from the College of New Jersey and a J.D. degree from Rutgers, the State University of New Jersey School of Law.