

PUBLICATION

Health Care Employers Beware: New Whistleblower Provisions In The Patient Protection and Affordable Care Act

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The recent passage of the health care reform package did more than impact the provision of health insurance. It also created new potential sources of liability for employers in the health care arena. The Patient Protection and Affordable Care Act (PPAC), enacted in March of this year, inserted provisions into existing laws with the stated intent of encouraging individuals to report fraudulent conduct in connection with the delivery of health care funded through public finances.

The first major change to existing law stemming from the PPAC extends the whistleblower protection provision in the Fair Labor Standards Act (FLSA) to employees involved in the provision of publicly financed health care services. In general terms, the whistleblower provision prohibits employers from discriminating against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee: (1) provided, or intends to provide, to the employer or government information that the employee reasonably believes to be a violation of the PPAC; (2) testified, or intends to testify, in a proceeding about any such violation; or (3) refused to participate in any activity the employee reasonably believed to be a violation of the PPAC or its regulations. An employee who believes that he or she has been retaliated against for any of these reasons is afforded several options to obtain relief, including filing a complaint with the Department of Labor, initiating an administrative proceeding to investigate the alleged retaliation, and/or initiation of a lawsuit in federal court following pursuit of the other remedies. Notably, however, these new FLSA whistleblower provisions apply only to alleged violations of Title I of the PPAC, which means that many employees are not covered by the provisions, including for example employees involved in caring for the elderly at nursing homes.

The PPAC also broadens the potential for employees to assert claims on behalf of the United States government pursuant to the False Claims Act (FCA). The relevant provision prohibits, and permits employees to initiate lawsuits due to, presentation of a false invoice for health care services through an exchange established by the PPAC. Any entity that submits a false claim is subject to a civil penalty between three to six times the amount of the false charge, along with payment of the costs of the government to bring the action to recover those amounts. Accordingly, employers engaged in the provision of federally-funded health care services potentially stand to have their billing methods questioned not only directly through government inquiries, but also through employees asserting claims through the FCA.

Overall, employers in the health care industry need to be aware of these new whistleblower provisions, as well as the resulting potential for increased risk of litigation exposure. If you need assistance with these or any labor and employment issue, do not hesitate to contact your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys, located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.*

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