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BLOG

New Whistleblower Rules Impact Health Plan Sponsors

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The Occupational Safety and Health Administration (OSHA) issued interim final rules regarding retaliation complaints under the Patient Protection and Affordable Care Act (PPACA). These rules, which became effective February 13, 2014, govern the employee protection (whistleblower) provisions of PPACA. The rules are intended to protect employees from retaliation for reporting PPACA violations, and establish procedures and time frames for handling retaliation complaints.

Section 1558 of PPACA amended the Fair Labor Standards Act to add section 18C. Section 18C protects employees against retaliation by an employer on account of the employee's: (i) receiving a subsidy through a health care exchange; or (ii) providing information about a PPACA violation. As you are probably aware by now, if any full-time employee receives a tax credit or cost sharing reduction from a health care exchange because his or her employer does not offer an affordable coverage option that provides minimum value, the employer may be assessed a tax penalty. Thus, an employer could be motivated to retaliate against an employee who has received such a credit. The rules are designed to prevent an employer from retaliating against an employee for "causing" the employer to be assessed a tax penalty by receiving a subsidy.

Section 18C also prohibits retaliation against an employee because the employee provided information related to a PPACA violation, testified in a proceeding concerning a PPACA violation, assisted or participated in such a proceeding, or objected to—or refused to participate in—any activity that the employee reasonably believed to be in violation of PPACA. For example, if an employee believes she has been retaliated against because she provided information to the Federal Government regarding an employer not complying with the prohibition of lifetime dollar limits on coverage, or coverage of preventive services with no cost sharing, she can bring a claim under section 18C.

Retaliation can include any action taken with respect to an employee's compensation or the terms, conditions or other privileges of employment. The rules list termination, discrimination, refusal to promote, intimidation, and reduction in hours as examples of some retaliatory activities. Individuals are protected from retaliation, not only by their own employers, but also by any other employer that provides their health insurance coverage (for example, their spouse's employer). Also, the inclusion of reinstatement and preliminary reinstatement to an employee's former position as remedies available for whistleblowers under Section 18C confirms that former employees can bring a section 18C complaint.

An employee must file any complaint with the Secretary of Labor (the "Secretary") within 180 days of the alleged retaliation. Upon receipt of the complaint, the Secretary will provide written notice to the party who is alleged to have committed the violation. If the Secretary finds that the employee has made a sufficient initial showing that the protected activity was a contributing factor in the alleged retaliatory action, the Secretary will, within 60 days of receipt of the complaint, give both parties an opportunity to submit a response and conduct an investigation. At that point, the burden of proof will shift to the employer to demonstrate, through clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity.

After investigating a complaint, the Secretary will issue written findings and can issue a preliminary order for an employer to take remedial action, including reinstating the employee to his former position (with back pay), and providing compensatory damages to him, as well as all of his reasonable costs and expenses. Each party can then file objections and request a hearing with an administrative law judge before the Secretary issues a final order, which the Secretary must do within 120 days after the conclusion of a hearing. If the Secretary finds that the complaint is frivolous or has been brought in bad faith, it can award a prevailing employer up to $1,000 in attorney's fees (realistically, this is likely to be only a small fraction of the employer's total attorney's fees). Finally, orders of the Secretary can be appealed to the appropriate United States Court of Appeals.

No employer wants to have to defend its employment actions in an investigation, hearing, or court case. Having to prove that its actions were not based on retaliation by "clear and convincing evidence" greatly adds to this burden. These whistleblower rules highlight why it is important for employers to clearly and appropriately document their reasons for taking employment actions. Careful compliance with PPACA, although helpful, will not shield an employer from these concerns—even if an employee is wrong about the alleged PPACA violation or the employee accepted a subsidy based on incorrect information, he can still allege retaliation.

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