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March 28, 2013

Health Care Reform's Whistleblower Provisions

Although most employers have focused on the health and welfare aspects of the Health Care Reform Act ("HCRA"), the statute also contains several whistleblower provisions designed to protect employees from retaliation for engaging in certain protected activities. The Department of Labor ("DOL") recently issued an interim final rule outlining the procedures for handling whistleblower complaints under the HCRA.

Effective Date. The HCRA's anti-retaliation provisions, as applicable to employers, became effective immediately when the statute was enacted on March 23, 2010.

Protected Activities. Currently, employers are not permitted to retaliate against an employee for (i) reporting potential violations of Title I of the HCRA (*e.g.*, denying health coverage to individuals due to pre-existing conditions) or (ii) receiving a health insurance tax credit or cost sharing reductions as a result of participating in a Health Insurance Exchange. Like other anti-retaliation provisions under federal law, retaliation includes threatening an employee, demotion, denial of overtime or promotion, reduction of pay or hours, or termination.

Remedies. Violation of the HCRA's anti-retaliation provision may result in remedies such as reinstatement of the employee to his or her former position, payment of back pay and interest, restoration of benefits, and payment of compensatory damages (including, if requested, any attorneys' fees and/or expert witness fees reasonably incurred).

Other Federal Whistleblower Provisions. The procedural framework found in the HCRA's whistleblower provision is similar to those found in other federal statutes such as the Sarbanes-Oxley Act. While the number of whistleblower complaints under other federal statutes, such as Sarbanes-Oxley, was initially relatively low, the number of complaints has steadily increased over time. As employees become more aware of the protections afforded under the HCRA's whistleblower provision, there will likely be a similar increase in complaints filed. Therefore, employers should be aware of this trend and take the necessary steps now to prepare themselves for such an increase.

Next Steps. In preparation for potential whistleblower complaints, employers should: (i) familiarize themselves with the HCRA's whistleblower provision and the

procedures outlined in the DOL's interim final rule; (ii) consider adopting an internal complaint process to encourage employees to report alleged violations and resolve disputes within the company; and (iii) conduct a thorough internal investigation into complaints when they arise.

Contact Information. For more information from Mazursky Constantine, please contact Doug Towns (404.888.8852), Amy Heppner (404.888.8825), Kelly Meyers (404.888.8838) or Alden Koste (404.888.8839). For more information from VCG Consultants, please contact Leslie Schneider (770.863.3617)

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