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ACA Retaliation Claim Survives Despite No Complaint About ACA Provisions

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On April 28, 2017, the United States Department of Labor Administrative Review Board ("ARB") allowed a whistleblower retaliation claim under the Patient Protection and Affordable Care Act ("ACA") to proceed even though the purported protected activity alleged in the complaint made no reference to ACA provisions. The case is *Gallas v. The Medical Center of Aurora*, DOL Administrative Review Board Nos. 16-012, 15-076, ALJ Nos. 2015-ACA-5, 2015-SOX-13 (ARB Apr. 28, 2017).

Complainant's Allegations

In *Gallas*, a nurse alleged that a medical center had fired her in retaliation for reporting violations of Title I of the ACA. Specifically, the nurse alleged that she complained that the medical center's "TeleMental Health" program, which involved conducting emergency psychiatric assessments remotely, violated the Emergency Medical Treatment and Labor Act ("EMTALA"), the Health Insurance Portability and Accountability Act ("HIPAA"), and state laws and ethics rules because it provided substandard service and because the medical center had improperly required insurance pre-authorization before admitting certain patients. The medical center's investigation found the nurse's complaints meritless, and it ultimately terminated the nurse after she repeatedly refused to perform evaluations remotely.

Ruling

On July 15, 2015, the ALJ granted the employer's motion to dismiss on the grounds that the complaint failed to allege any protected activity under the ACA. The ARB, comprised entirely of Obama appointees, reversed this decision on appeal, holding that the pleading standard for a whistleblower ACA claim "is not a demanding standard." Rather, a complaint "need only allege activity or disclosures **'*related*'** to ACA's subject matter" – it need not cite a specific section of the ACA or identify an actual violation of the ACA. Indeed, a disclosure is protected if it "relates to a general subject that was not clearly outside the realm covered by the [ACA]."

Applying this standard, the ARB held that while the ACA does not explicitly incorporate the laws cited by the nurse (*i.e.*, EMTALA or HIPAA), the subject matter of those statutes is addressed by many of the ACA's general reforms, including its provisions on the use of best clinical practices, quality care reporting and patient protections related to emergency care, and essential health benefits requirements. The ARB also noted that the ACA either extended or rendered moot many of HIPPA's portability rules. Thus, the nurse's alleged protected activity relating to EMTALA, HIPAA and pre-authorization sufficiently related to matters contained in the ACA.

Implications

Given that ACA protected activity need only relate to a general subject covered by the ACA – at least according to the DOL's ARB as currently constituted – employers in the healthcare industry face a challenging standard regarding the scope of protected activity. Unless the employer can essentially show that the employee's activity bears no relation to health care or health care financing, it will likely be deemed by the current ARB to be within the realm of the ACA's whistleblower protection.

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