Employment Law Implications Of The Affordable Care Act

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On March 23, 2010, President Obama signed into law the Affordable Care Act ("ACA" or the "Act"), better known to some as Obamacare, which aimed to provide healthcare on a nationwide basis. The ACA mandates that all large employers, i.e., those with more than 50 full- time employees, provide affordable healthcare to their employees or face stiff penalties. Under the Act, any employer than works more than 30 hours a week on average is considered a "full- time employee." Furthermore, the insurance provided must be both "affordable" and "adequate," meaning that it may not exceed 9.5% of a full-time employee's taxable household income for the year and must cover at least 60% of anticipated healthcare costs for the year. Employers who fail to provide healthcare to all qualified employees or provide healthcare that is not "affordable" or "adequate," will quickly find themselves subject to stiff penalties, including fines of up to $3,000 per employee. Given the new rights afforded to workers under the Act, the employment law implications of the ACA are substantial and several causes of action may be applicable where employers do not live up to their obligations under the Act.

Retaliation Claims under the ACA

As is the case in many employment situations, employees thinking about complaining about their employer's non-compliance with the ACA may be afraid that their employer will retaliate against them. However, the ACA offers employees protection in this situation. Specifically, the Act amends the Fair Labor Standards Act, making it illegal to "discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment" where the employee has provided "information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of (Title I of the ACA)" to their employer, the Federal Government, or the attorney general. While the ACA fails to give any additional guidance on what actions will be considered retaliatory, the Department of Labor ("DOL") has specified that the following are adverse employment actions sufficient to trigger the whistleblower protections of the ACA:

- Firing or laying off;
- Blacklisting;
- Demoting;
- Denying overtime or promotion;
- Disciplining;
- Denying benefits;
- Failure to hire or rehire;
- Intimidation;
- Making threats;
- Reassignment affecting prospects for promotion;
- Reducing pay or hours.

See 29 CFR Part 1984. This begs the question of what is considered a protected complaint under the

ACA. The DOL has brought some clarity to this issue, calling the whistleblower protections under the ACA “analogous” to those under the Sarbanes-Oxley Act of 2002 (“SOX”). Under SOX, an employee must have “reasonably believed that defendant’s conduct violated federal law” in making a complaint. Guyden v. Aetna, Inc., 544 F.3d 376, 384 (2d Cir. 2008).

However, the employee need not specifically “allege fraud” or “reference a specific statute in order to engage in protected activity.” Barker v. UBS AG, 888 F.Supp.2d 291 (D. Conn. 2012).

In assessing whether an employee’s belief that a defendant has violated federal law is reasonable, courts consider both objective and subjective components. To determine the objective reasonableness of the plaintiff’s belief, courts look to the bases of the knowledge available to a reasonable person in the circumstances with the employee’s training and experience.” Sharkey v. J.P. Morgan Chase & Co., No. 10 Civ. 3824, 2011 WL 135026, at *6 (S.D.N.Y. Jan.14, 2011). The court in Lehinsky v. Telvent Git, S.A., No. 10 Civ. 4511 (JPO), 2013 WL 1811877, at *6 (S.D.N.Y. May 1, 2013) adopted the stance held by the Department of Labor that “the critical focus is on whether the employee reported conduct that he or she reasonably believes constituted a violation of federal law.” Id. Accordingly, an employee would trigger ACA whistleblower protections so long as he “identif[ies] conduct that falls within the ample bounds ” of the law. Id. The standard to satisfy a plaintiff’s subjective belief regarding the unlawfulness of conduct is also liberal. Indeed, the court in Lehinsky found a complaint to be protected where the plaintiff testified that his belief was that the conduct in question “was unethical, certainly immoral, and may even be illegal but I wasn’t sure since I’m not a lawyer.” Id. at 10.

If an employee is able to demonstrate that they had a reasonable basis for their complaint, and that the complaint was a “contributing factor” leading to the adverse employment action, the employee has a prima facie case for retaliation. The burden then shifts to the employer to show by clear and convincing evidence that the same employment action would have resulted absent the protected activity. Therefore, complaining employees are held to a relatively lenient standard to trigger protection under the ACA.

ERISA Interference

Given the substantial obligations that the ACA imposes on employers, some employers may attempt to manipulate their number of employees and the hours these employees work to prevent being subject to the requirements of the ACA. The ACA requires that employees who work more than 30 hours per week receive health coverage. Thus, as a practical matter, employers may attempt to limit fulltime employees to workweeks of fewer than 30 hours or lay off employees so as to employ fewer than 50 employees, both of which could expose them to claims for interference under the Employee Retirement Income Security Act (“ERISA”).

ERISA applies to health plans established by employers. See, e.g., Gioia v. Forbes Media LLC, 501 Fed.Appx. 52 (2d Cir. 2012). Plan regulation is “exclusively a federal concern.” Ingersoll–Rand Co. v. McClendon, 498 U.S. 133, 138 (1990). Section 510 of ERISA prohibits an adverse employment action being taken against employee for “for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefit plan].” 29 U.S.C.A. § 1140. Section 510 also protects against retaliation for testifying or providing information relating to ERISA. “Section 510 was designed primarily to prevent unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights.” Dister v. Continental Group, Inc., 859 F.2d 1108 (2d Cir. 1988).

Claims of ERISA interference under Section 510 involve three elements prohibited employer conduct, taken for the purpose of interfering with a right under ERISA, implicating any right to which the employee may become entitled. Ello v. Singh, 531 F.Supp.2d 552, 569 (S.D.N.Y. 2007). However, because there is rarely direct proof of the specific intent to deprive an employee of benefits to which he or she is entitled, the Second Circuit applies the McDonnell Douglas framework to ERISA interference claims. See, e.g., Dister v. Continental Group, Inc., 859 F.2d 1108 (2d Cir. 1988). To establish a prima facie case, a plaintiff must demonstrate that he or she: (1) was eligible for benefits under an ERISA-covered plan “(2) was qualified for the position, and (3) was discharged or denied employment under circumstances that give rise to an inference of discrimination.” Id. Once the plaintiff satisfies the minimal burden of demonstrating a prima facie case, the burden shifts to the employer to articulate a legitimate non- discriminatory reason for the adverse employment action. Although ERISA predates the ACA, the right to healthcare under the ACA makes ERISA interference claims potentially viable where an employer takes an adverse employment action against an employee to prevent them gaining a right to healthcare under the ACA.

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