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Employers Beware:
How the Recent Health Care Reform Legislation Affects Employers

On March 21, 2010, the House of Representatives passed the Patient Protection and Affordable Care Act ("PPACA"), which President Obama signed into law on March 23, 2010. The health care reform law will make far-reaching changes to the United States health care system over the next several years. The House and Senate also passed a separate bill, the Health Care and Education Reconciliation Act of 2010 ("HCERA"), which President Obama signed into law on March 30, 2010. HCERA resolves the differences between the House and Senate versions of the health care bill by amending the PPACA.

Several PPACA provisions will affect employers both immediately and in the future. While PPACA's provisions relating to group health plans are of vital importance to employers, this alert focuses solely on the employment provisions concerning whistleblower protections and breastfeeding.

I. Whistleblower Protections

To prevent corruption and misuse of federal funds, the PPACA provides employees with whistleblower protection and strengthens the False Claims Act. The provisions implementing these protections include the following: 1) a whistleblower retaliation cause of action added to the Fair Labor Standards Act ("FLSA"); 2) abuse-reporting protections for employees of federally-funded long-term care facilities; 3) mandatory implementation of a standard complaint process for nursing home residents and their representatives (including a retaliation prohibition); and 4) an expanded definition of "original source" under the False Claims Act ("FCA"). Given the expansive scope of these employee-friendly protections, employers are likely to see a wave of whistleblower-related litigation under the PPACA. Apart from the nursing home complaint statute, these employment-related provisions are effective immediately upon PPACA's enactment on March 23, 2010.

A. A New Cause of Action – Whistleblower Retaliation

Section 1558 of the PPACA amends the FLSA to prohibit retaliation against an employee who provides or *is about to provide* an employer, the federal government, or a state attorney general with information that the employee *reasonably believes* to be a violation of PPACA Title I. The whistleblower provision also protects employees who participate in investigations, and employees who object to or refuse to participate in any activity that the employee reasonably believes to be a violation of PPACA Title I. In turn, the statute protects employees who are "about to" blow the whistle. This "about to" coverage provision is undefined. For example, how does an employer prevent retaliatory action against an employee who supposedly "intends" to blow the whistle about alleged activities that violate the PPACA? Indeed, Title I includes a wide range of rules governing health insurance, including a prohibition against denying coverage based upon a preexisting condition, requirements preventing discrimination based upon an individual's receipt of health insurance subsidies, and rules regarding the failure of an insurer to rebate portions of excess premiums. Consequently, Section 1558 protects a broad range of employee disclosures as covered "whistle blowing" activity.

Moreover, the burdens of proof under Section 1558 are favorable to employees. To prevail on a Section 1558 retaliation claim, a complainant-employee must prove by a preponderance of the evidence that the

complainant's protected activity was a contributing factor to the employer's adverse employment action. A contributing factor is defined as any factor which, alone or in connection with other factors, tends to affect in any way the employment decision's outcome. The employer can avoid liability only if it proves by clear and convincing evidence that it would have taken the same action in the absence of the employee engaging in the protected conduct.

Section 1558 also incorporates the procedural rules, burden-shifting framework, remedies, and statute of limitations of the Consumer Product Safety Improvement Act of 2008 (15 U.S.C. 2087(b)). Under these provisions, the employee must file a complaint with the Occupational Safety and Health Administration ("OSHA") within 180 days of the employee becoming aware of the retaliatory action. OSHA will then investigate the complaint and can order preliminary relief, including reinstatement. Further, either party can appeal OSHA's determination by requesting a hearing before an administrative law judge of the U.S. Department of Labor.

If the Secretary of Labor fails to issue a final decision within 210 days after a complaint is filed, or within 90 days after receiving a written determination from OSHA, the complainant may pursue the claim in federal court. Once in federal court, either party may request a trial by jury. The statute's broad range of remedies include reinstatement, back pay, special damages (which may include emotional distress damages), and attorneys' fees.

B. Reporting Protections for Patient Abuse in Care Facilities – the Elder Justice Act of 2009

Under Section 6703(b)(3) of the PPACA, long-term care facilities that receive more than $10,000 in federal funding must notify all officers, employees, managers, and contractors that they are legally required to report any reasonable suspicion of a crime against any resident or person receiving facility care to the Secretary of the U.S. Department of Health and Human Services and at least one local law enforcement agency.

Section 6703(b)(3) prohibits long-term care facilities from retaliating against an employee for any lawful actions undertaken by the employee, which include making a report under Section 6703(b)(3). If an employer violates this anti-retaliation provision, the long-term care facility may be fined up to $200,000 and excluded from federal programs for up to two years.

C. A Standard Complaint Process for Nursing Facility Residents and their Representatives

Section 6105 of the PPACA amends the Social Security Act by requiring states to make available federally prescribed standardized complaint forms for residents of skilled nursing facilities and persons acting on behalf of residents. Section 6105 also requires each state to establish a complaint resolution process to track and investigate complaints and to ensure that the skilled nursing facility does not retaliate against complainants. The provisions of Section 6105 do not take effect until March 23, 2011.

D. Expanded Definition of Original Source for Qui Tam Relators

Section 10104(j)(2) of the PPACA amends the FCA by expanding the original source exception to the public disclosure bar in a whistleblower qui tam action. A qui tam action is one in which a private individual, who brings a legal action exposing federal government fraud, can receive all or part of any penalty imposed. An original source will now include an "individual who either (i) prior to a public

disclosure . . . has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (ii) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section."

Section 10104(j)(2) will bring uniformity to the critical issues that arise in most qui tam actions, as well as increase the likelihood that relators will satisfy the original source exception. While the public disclosure bar of the FCA – designed to prevent actions based on public disclosures – remains, this amendment to the FCA will likely encourage more fraud-combating qui tam actions.

II. Breastfeeding Protections: Section 4207 of the PPACA

A. The Break Requirements of Section 4207

Section 4207 of the PPACA amends Section 7 of the FLSA by requiring employers to provide nursing mothers with reasonable lactation breaks. This amendment to the FLSA, effective immediately, requires employers to make available the following: (1) reasonable breaks for employees to express breast milk each time the employee has a need; and (2) a private location in which to take those breaks.

1. *Employers Must Provide Reasonable Break Time for Nursing Mothers*

Section 4207 requires employers to provide nursing mothers with reasonable break time to express breast milk. Section 4207 additionally requires the employer to provide these reasonable breaks "each time such employee has a need to express the milk." Nursing mothers have the right to these breaks for one year after the child's birth.

Section 4207 does not quantify what is a reasonable length of time for a nursing mother break, nor does it set a limit on the number of breaks that nursing mothers are permitted to take during the workday. It does, however, explicitly state that employers are not required to compensate employees for the breaks if they are taken during work time.[1]

Section 4207 does not give employers discretion to regulate (i) the frequency with which employees take these breaks, or (ii) when employees may take these breaks. Instead, the amendment gives an employee the right to take a reasonable break each time the employee has a need to express milk. Thus, the language of Section 4207 apparently requires employers to allow a nursing mother to take a break each time she needs to express breast milk.

2. *Employers Must Provide a Private Location for Nursing Mother to Take Breaks*

Employers must provide nursing mothers a private place where they can express their breast milk. Section 4207 requires that this place be "shielded from view" and "free from intrusion from coworkers and the public." Section 4207 expressly forbids the designation of a bathroom as the requisite private place for nursing mother breaks. Unfortunately, the statute does not define an appropriate "private place."

[1] If state law requires an employer to provide paid breaks to nursing mothers, the employer must comply with state law because the PPACA does not preempt state laws that provide greater protection to employees.

B. Small Employer Exemption

The break requirements of Section 4207 do not apply automatically to all employers. Employers with less than 50 employees are exempt from the requirements of Section 4207 if providing nursing mothers with lactation breaks would impose an undue hardship. Undue hardship is determined by weighing the "significant difficulty or expense" of providing breaks against the "size, financial resources, nature, or structure of the employer's business."

C. Section 4207 Does Not Preempt More Employee-Friendly State Laws

Section 4207 does not preempt state law that provides greater protection to nursing mothers. Therefore, if the protections of the state law are greater than the protections of Section 4207, then employers must adhere to the more expansive state law provisions

Seventeen states, as well as the District of Columbia and Puerto Rico, have laws that require employers to provide nursing mothers with lactation breaks.[2] While Texas does not have a law requiring employers to provide reasonable break time to nursing mothers, Texas employers with operations in other states must be mindful of the various state laws in which they conduct business.[3] If a state law includes greater employee protections, the employer must abide by those state law provisions for employees within that state and the provisions of Section 4207 for employees within Texas. Accordingly, employers operating multi-state businesses will be subject to differing break time obligations.

[2] The following states have laws requiring employers to provide break time for nursing mothers to express breast milk: Alabama, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Maine, Minnesota, Montana, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Tennessee, and Vermont.

[3] Texas has a statute entitling mothers to breastfeed their babies "in any location in which the mother is authorized to be." TEX. HEALTH & SAFETY CODE ANN. § 165.002 (Vernon 2001). Further, while Texas does not require employers to provide nursing mothers with lactation breaks, it does allow a business to use the designation "mother-friendly" in its promotional materials if the business develops a breastfeeding worksite policy. TEX. HEALTH & SAFETY CODE ANN. § 165.003(a) (Vernon 2001). To qualify as a "mother-friendly" business, the breastfeeding policy must provide nursing mothers the following: (1) work schedule flexibility, including scheduling breaks and work patterns to allow time for expression of breast milk; (2) a private, accessible location to express breast milk; (3) a clean, safe water source and a sink for washing hands and rinsing out needed breast-pumping equipment near the private, accessible location; and (4) access to hygienic storage alternatives in the workplace for the nursing mother's breast milk. *Id.* Once an employer puts in place a breastfeeding policy that meets the statutory requirements, it must submit an application to the Texas Department of State Health Services to receive the designation of a "mother-friendly" business. The Texas statute explicitly requires an employer to submit its breastfeeding policy to the Department of State Health Services before it can receive the "mother-friendly" designation. TEX. HEALTH & SAFETY CODE ANN. § 165.003(b). The Texas Mother-Friendly Business Application is available on the Department of State Health Services' website by clicking on the following link: https://www.dshs.state.tx.us/wichd/lactate/mfwapp.shtm. Given that the requirements of Section 4207 of the PPACA – providing reasonable break time to nursing mothers and a private location to express breast milk – essentially mirror the first two requirements of the Texas statute, a Texas employer could apply for the "mother-friendly" designation if it included the statutory requirements listed in numbers (3) and (4) above in its breastfeeding break policy. Because Texas employers must comply with the requirements of Section 4207, employers who desire to be designated "mother-friendly" should strongly consider going beyond the requirements of Section 4207 and satisfy the additional requirements of the Texas statute.

D. Actions Employers Should Take to Ensure Compliance with Section 4207

Because Section 4207 went into effect upon enactment of the PPACA, employers must take immediate action to ensure that their policies and procedures are in compliance with the amendment's requirements. For example, employers should review their break policies and update them as necessary to include reasonable breaks for nursing mothers in a private location other than a bathroom. If state law provides greater employee protections than Section 4207, employers should review existing policies to ensure that they are in compliance with state law. Remember, employers that operate multi-state businesses must review the laws of each relevant state and update their policies and employee handbooks to comply with the state law or Section 4207 – whichever provides more expansive protections. Once the employer revises its break policy, it should provide all employees with a copy of the updated policy.

Employers should also identify places in each worksite where employees report to work that can be used by nursing mothers to take their lactation breaks. Section 4207 does not require employers to provide a separate room for its employees, only that the location be "shielded from view" and "free from intrusion" during the break. Bathrooms are not appropriate locations under Section 4207.

Additionally, Employers should train managers and supervisors on the changes to the company's break policy. Managers and supervisors must understand that a nursing mother has a right, during the first year of her child's birth, to take a reasonable break each time she needs to express breast milk. To facilitate easy implementation of the break policy for nursing mothers, employers should provide managers and supervisors with a list of private locations that can be used as break rooms.

E. Questions That Remain Regarding the Requirements of Section 4207

The U.S. Department of Labor has not yet defined any of the terms of Section 4207, such as what is considered a "reasonable" break time, how often an employer must allow nursing mothers to take breaks, or what is considered a place "shielded from view" and "free from intrusion." Given the lack of guidance at this time, employers should be cautious and consult with counsel in formulating appropriate policies, practices, and procedures that comply with the requirements of Section 4207 or any relevant state law with greater employee protections.

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