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New Law Protects Health Care Workers Against Retaliation

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Insight — May 25, 2007

On March 29, 2007, Governor Ritter signed HB 07-1133 (which Governor Owens vetoed last year) into law. The new law prohibits retaliation against health care workers who report issues related to patient safety or quality of care. Despite the legislature's good intentions, HB 07-1133 is somewhat ambiguous and, like any law in the employment arena, it is subject to abuse by disgruntled employees. Health care organizations should become familiar with the protections afforded to employees under this law, and consider steps they can take to minimize potential claims from employees.

Who is covered by the new law?
HB 07-1133 prohibits "health care providers" from retaliating against certain employees for making a good faith report or disclosure concerning patient care or safety. A "health care provider" is any healthcare facility licensed under Colorado Revised Statutes section 25-3-101. That statute generally covers hospitals, community clinics, rehabilitation centers, nursing care facilities, dialysis treatment clinics, community mental health centers, ambulatory surgery centers, and other similar types of facilities. A health care provider also includes any individual "authorized to practice some component of the healing arts by license, certificate, or registration."

Not all employees of a health care organization are covered by the new law. Instead, it is limited to those employees who qualify as "health care workers." Health care workers include employees who are "certified, registered or licensed" under certain provisions of Colorado law. For example, pharmacists, acupuncturists, podiatrists, chiropractors, dentists and dental hygienists, physicians, midwives, nurses, optometrists, physical therapists, mental health providers, and emergency medical technicians, among others, are considered health care workers.

Of course, employees who do not meet this definition – such as secretaries, administrative assistants, or custodians – who raise concerns related to patient care or safety are not necessarily without protection. For example, those employees may be able to assert a claim for wrongful discharge in violation of public policy if they are fired for disclosing concerns related to patient care, depending on the nature of the issue they raise.

What conduct is protected?
It is also important to understand what conduct is, and is not, protected by the new law. HB 07-1133 protects those employees who make a "good faith report or disclosure" concerning patient safety information or quality of

patient care. Such reports may include concerns relating to "any practice, procedure, action, or failure to act with regard to patient safety that concerns information regarding a generally accepted standard of care; a law, rule, regulation, or declaratory ruling adopted pursuant to law; or compliance with a professional licensure requirement."

Importantly, the health care worker is entitled to protection only if he or she had a reasonable belief that the report was true, and the report was not made with malice or for some personal benefit. In other words, a deliberately false report, or even one that is made without regard for whether or not it is true, is generally not protected.

Unfortunately, it is often difficult to determine when an employee is lying or lacks a reasonable basis for making a complaint or report. The mere fact that the report is unfounded does not necessarily mean that the employee knew it was so or lacked a good faith basis for making the report. Thus, health care organizations should be careful before taking disciplinary action against an employee who has reported patient care or safety issues, even if the report or complaint is factually incorrect or unfounded.

What actions are prohibited?
Health care organizations cannot discipline a health care worker in retaliation for reporting or disclosing patient care or safety issues. Discipline can take many forms, any includes any direct or indirect form of penalty, as well as the threat of such penalty. Dismissal, demotion, reassignment, and other actions that negatively impact the individual's pay or other terms and conditions of employment are considered disciplinary in nature. However, the law also prohibits "admonishments." It is unclear exactly what type of action would constitute an admonishment, e.g., is a verbal warning sufficient? Until the courts are called upon to clarify these terms, health care organizations should be aware that any action taken against a health care worker, no matter how minor, may be perceived as retaliation.

Practical Tips for Complying with the New Law
The law provides some protections for health care organizations. First, a health care organization is not prohibited from disciplining or terminating a health care worker for reasons unrelated to an employee's report or disclosure of patient care or safety issues. Thus, the new law is not a guarantee of continued employment for employees who make such reports.

However, a court or jury may infer a retaliatory motive – even where none exists -- if an employee is disciplined or terminated shortly after reporting a patient care issue. Thus, health care organizations should carefully analyze discipline situations involving a worker who has made a report concerning patient care or safety. As always, good documentation of performance or discipline issues will be critical in defending against a retaliation claim.

Second, health care workers are required to follow internal reporting procedures, if those procedures are in writing and provided to the employee, before reporting or disclosing patient care issues to others.

Consequently, health care organizations should consider implementing (if they do not already have one) an internal reporting procedure for patient care and safety issues. Those procedures should, among other things, identify to whom reports must be made, how the organization will respond to such reports, and remind employees that the organization does not tolerate any type of retaliation for making a good faith report or disclosure related to patient care or safety. The procedure should be distributed to existing and new employees, and employers should maintain some method of confirming employees' receipt of the policy or procedure.

Many questions remain as to how the courts will interpret the various terms in the new law, and the potential remedies that might be available to health care workers who claim to be the victims of retaliation for reporting patient care or safety issues. Employees who are terminated may also rely on this law to assert a claim for wrongful discharge in violation of public policy. Last year, the Colorado Court of Appeals rejected a wrongful discharge lawsuit brought by a nurse who claimed she was fired for acting as a patient advocate. The court might have reached a different result had this law been in force at the time of its decision.

Until the courts are called upon to clarify the new law, health care organizations should carefully analyze any employment decision involving a health care worker who has reported patient safety or care issues.

For more information on HB 07-1133, please contact Mark Wiletsky at (303) 473-2864 or mbwiletsky@hollandhart.com.

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