An Overview of the Anti-Retaliation Provision in the New Patient Protection and Affordable Care Act

By Nancy Bloodgood and Lucy C. Sanders

The Patient Protection and Affordable Care Act (PPACA)[1] was signed into law on March 23, 2010, by President Barack Obama. In addition to creating many changes to the nation's health care system, the law created a new cause of action that involves employment law. Section 1558 of the PPACA created a cause of action for retaliation to be used by any employee who has been discharged or in any manner discriminated against with respect to his or her compensation, terms, conditions, or other privileges of employment because of the employee's involvement with the PPACA. The new law generally protects three different types of activities: (1) reporting and participation in proceedings, (2) refusal to participate in violations, and (3) receipt of subsidies.

The PPACA is currently facing intense scrutiny in federal district and appellate courts. By this time next year, it is likely that the Supreme Court will have ruled on the constitutionality of the PPACA. A ruling against the act could eliminate the entire act, including the anti-retaliation provision, as some courts have held that the act's potentially unconstitutional provisions are not severable.[2] Even if the PPACA is ruled unconstitutional, the initial inclusion of § 1558 into the framework of the act affirms that protections against retaliation continue to be popular in employment laws and litigation. Most established employment laws include anti-retaliation provisions and other new employment laws, such as the American Recovery and Reinvestment Act of 2009, also include anti-retaliation provisions.

Retaliation is not only prevalent in legislation; it has also become increasingly prevalent in courts and administrative proceedings. Between Oct. 1, 2007, and Sept. 20, 2008, retaliation complaints filed with the Equal Employment Opportunity Commission (EEOC) rose by 23 percent, while other claims rose by only 12 percent.[3] Attorneys, litigants, and employers are becoming increasingly aware of the prevalence of retaliation in the workplace as well as the legal protections afforded to employees. The EEOC is also aware of the need for strong anti-retaliation provisions. In 2009, an associate general counsel for the EEOC stated that eradicating retaliation in the workplace was the commission's top priority because, if employees don't feel free to file complaints, then "laws don't get enforced." Moreover, the Supreme Court has placed its stamp of approval on retaliation cases by issuing two recent decisions that lower the burdens that must be met by employees seeking to prevail on retaliation claims.

First, in *Burlington Northern & Santa Fe Railroad v. White*, 126 S. Ct. 2405 (2006), the Court held that the anti-retaliation provision included in Title VII of the Civil Rights Act of 1964 "extends beyond workplace-related or employment-related retaliatory acts and harm" and, therefore, forbids a broader range of actions than the "ultimate employment decisions" forbidden by Title VII's anti-discrimination provision. *Id.* at 2414. The Court made it clear that, in order to prove retaliation, a plaintiff must show a reasonable employee would have found the retaliatory behavior to be materially adverse, specifically that the retaliatory behavior would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2415. The Court chose to focus on the perspective of a reasonable employee in the plaintiff's position in order to "screen out trivial conduct" but still "effectively captur[e] those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination." *Id.* at 2416.

Five years after its decision in *Burlington*, the Court decided *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011), which further expanded the scope of retaliation claims. In *Kasten*, the Court examined what types of employee complaints are protected by anti-retaliation laws. Specifically, the Court examined the anti-retaliation provision of the Fair Labor Standards Act (FLSA) and held that, "[t]o fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." *Id.*at 1335. However, in so holding, the Court clarified that "[t]his standard can be met … by oral complaints, as well as by written ones." *Id.*

Part of the Court's rationale in *Kasten* was based on the fact that the FLSA was created to protect against less educated and overworked employees. As the Court explained, if it held that only written complaints were protected, it would essentially "limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers" who are the "workers most in need

of the Act's help." *Id.* at 1333–34.

Similarly, the PPACA was enacted to bring an end to the insurance industry's abuses and to attempt to provide rights, protections, and benefits to individuals who were previously taken advantage of or refused coverage by insurance companies, including employees who are not highly educated or do not work in highly compensated jobs. As such, in light of the Court's rationale in *Kasten*, it is likely that the PPACA's anti-retaliation provisions will be broadly interpreted in an attempt to protect the employees the law was enacted to help. However, the Courts may interpret the PPACA's language differently than they interpreted the FLSA's language, because the PPACA uses slightly different terminology in its anti-retaliation provision. The FLSA uses the term "filing a complaint," and this language was at the heart of the Court's discussion in *Kasten*; specifically, the Court was tasked with determining whether the statute should be interpreted to include "filing" an oral complaint. The PPACA does not include this specific language; instead, the PPACA focuses on protecting employees who *provide information* regarding PPACA violations. A quick analysis of the plain language of the term "provide information" suggests that its meaning appears to be broader than that of the phrase "filing a complaint." However, it is difficult to anticipate how the courts might interpret the language because there are currently no published cases that interpret similar language found in the Consumer Product Safety Improvement Act. Nevertheless, if and when it becomes necessary to define and interpret the language, courts are likely to follow the Supreme Court's recent tendency to interpret the language broadly in order to encourage employees to come forward with complaints and concerns.

The Supreme Court also broadly interpreted similar language in *NLRB v. Scrivener*, 92 S. Ct. 798 (1972), when the Court determined that the language of the NLRA's [National Labor Relations Act] anti-retaliation provision "filed charges or given testimony," 29 U.S.C. § 158(a)(4), should be interpreted in a way that protects workers who neither filed charges nor were "called formally to testify" but simply "participate[d] in a [National Labor Relations] Board investigation." The plain language of the PPACA's anti-retaliation provision is already broader and stronger than the NLRA language is, because the PPACA protects not only filing charges or giving testimony but also "assisting" in a proceeding. This language will also probably be interpreted broadly should it become necessary for the courts to interpret it beyond its plain language.

To understand the exact protections of the anti-retaliation provision, it is useful to examine the statute within the framework of the three distinct types of actions that are protected by the act.

Reporting of and Participating in Proceedings

As with other causes of action for retaliation, an employee is protected from retaliation under the PPACA if he or she reports the employer's violation of the law.[4] Under the PPACA, an employee is only protected when reporting a violation of Title I of the act. The employee is protected if he or she reports the violation to the federal government or the attorney general of a state and also if the employee makes an internal report of the violation to the employer. The inclusion of this provision is noteworthy because some anti-retaliation provisions do not expressly protect internal complaints and, as a result, the courts have been tasked with determining whether these laws were intended to protect internal complaints. In addition to protecting internal and external reports of violations, the anti-retaliation provision also protects an employee's report of any act or omission he or she *reasonably believes* to be a violation of Title I of the PPACA.

Thus, it appears that an employee is essentially protected from retaliation for any type of complaint relating to Title I of the PPACA, even if the complaint is made internally and reports an act or omission that does not actually violate the act but that the employee reasonably believes violates the act. Because the provisions of the PPACA are fairly complicated, employees could have actionable retaliation claims arising from a wide range of complaints about acts they reasonably believed violated the PPACA.

In addition, employees are protected from retaliation in response to their testimony in a proceeding concerning an employer's violation of Title I of the PPACA or any other participation or assistance in such proceedings.[5] Arguably, "assistance" could include something as nominal as being interviewed in connection with a proceeding. Even if the employee has not yet testified, participated, or assisted in a proceeding, but is about to do so, the employee is protected. Of course, the employee's upcoming participation or testimony would not be protected if the employer were unaware of the employee's plans, unless the employee could somehow prove a causal link between his or her upcoming participation and the employer's discrimination against the employee. Doing so is likely to be impossible if the employer did not have knowledge of the employee's planned participation or if the employee does not have proof of the employer's possible knowledge of the employee's planned participation.

These provisions protect employees who report or participate only in proceedings regarding violations of Title I of the PPACA. However, Title I is extensive; therefore, there are numerous activities by employers that could potentially violate Title I. Title I includes provisions that include, but are not limited to, the following:

- prohibitions on lifetime limits, unreasonable annual limits, rescissions of coverage, and discrimination based on salary;
- required coverage of preventive health services;
- extensions of coverage for dependents;
- development of uniform documents and standardized definitions;
- requirements for dissemination of uniform documents and proper notice of plan modifications;
- reporting requirements;
- accounting requirements;
- requirements to provide annual premium rebates to enrollees, if applicable;

- coverage for uninsured individuals with a pre-existing condition;
- protection against the act of "dumping" high-risk individuals; and
- regulations for employment-based plans for early retirees.

If an employee has a reasonable belief that his or her employer is violating one of these provisions, or one of the other provisions included within Title I, then the employee is protected from retaliation by the employer if the employee can prove that his or her report was a contributing factor to the employer's retaliatory behavior.

Refusal to Participate in Violations

In addition to protecting employees who report violations or participate in proceedings related to violations, the PPACA also protects employees who refuse to participate in activities they reasonably believe to be in violation of the act.[6] This provision is also limited to violations occurring under Title I of the act. The provision protects not only employees who refuse to participate in the perceived violation but also employees who *object* to the requested activity. Thus, as long as an employee either objects to an employer's request to violate the PPACA or refuses to violate the PPACA, then the employee is protected, regardless of whether his or her objection or refusal is direct, indirect, verbal, or even *nonverbal*.

For example, because this provision includes protection for employees who refuse to participate in any policy, practice, or assigned task that they reasonably believe violates the PPACA, employees could silently refuse to follow an employer's policy and, if they are fired for doing so, could bring a retaliation cause of action against the employer, even if the employees never voiced their concern about the illegality of the policy and even if the policy does not actually violate the PPACA, as long as the employees reasonably believed that the policy violated the PPACA. As another example, an employee who objects to an employer's policy or practice because the employee believes it violates the PPACA could have a cause of action based on retaliation even if the belief is incorrect and even if the employee never reports the suspected illegality internally or externally, but merely contemporaneously objects to being asked to follow the policy and then acquiesces to it.

The breadth of the anti-retaliation provision could create dangers for employers because employers may assume that an employee who objects to a policy, practice, or activity, but later acquiesces to the policy or engages in the activity, is doing so because he or she has realized that the policy, practice, or activity does not, in fact, violate the PPACA. However, an employee who objects to a policy and later follows the policy could still bring a retaliation cause of action even if some amount of time passes between the employee's objection and the employer's retaliatory behavior, assuming the employee was able to prove that the objection was a contributing factor to the retaliatory behavior.

This provision is likely to be most applicable to employees who work in Human Resources Departments, because they are more likely than other employees to have knowledge of internal policies regarding the PPACA and more likely to be asked to administer policies or practices involving the PPACA. Thus, members of a company's Human Resource Department are the employees who are most likely to be familiar enough with the PPACA to have a reasonable belief that a certain policy violates the act and the employees whose job responsibilities require them to enforce these policies or practices.

This PPACA provision is similar to several state common law causes of action based on public policy exceptions to at-will employment. As Justice Chandler of the South Carolina Supreme Court wrote in *Ludwick v. This Minute of Carolina Inc.*, 337 S.E.2d 213, 216 (S.C. 1985), South Carolina's public policy exception to its at-will employment doctrine is integral because "[i]n a nation of laws the mere encouragement that one violate the law is unsavory; the threat of retaliation for refusing to do so is intolerable and impermissible." South Carolina's public policy cause of action provides a cause of action to employees for wrongful termination if their termination is a violation of a clear mandate of public policy. Until now, the public policy exception has been interpreted very narrowly; the only actions that are clearly protected are actions in which an employee is "confronted with the dilemma of choosing between her livelihood, on the one hand, and obedience to the law of the state, on the other." *Id.* However, the PPACA's provision protecting employees who object to violations of the act or refuse to participate in violations appears to be much broader and more employee-friendly than most public policy laws are. Thus, if the action the employee objects to or refuses to participate in falls within the PPACA, the employee will have greater protections than he or she may have had if the action had generally violated public policy but not the PPACA. It will be interesting to follow the courts' interpretation of this provision of the PPACA to see whether the provision is interpreted as broadly as it is written. If federal courts interpret this provision broadly, then state courts *may* follow the lead of the federal courts and broaden their interpretations of their own public policy exceptions to at-will employment.

Receipt of Subsidies

Perhaps the broadest and most unique provision of the PPACA anti-retaliation cause of action is the provision that protects employees from retaliation for receiving a credit under 26 U.S.C. § 36B or a subsidy under 42 U.S.C. § 18071.[7] This provision is unique in that it protects employees from retaliation for taking advantage of the benefits of the PPACA. Specifically, if an employee takes advantage of the provision that allows individuals and families with a household income between 133 percent and 400 percent of the federal poverty level to take a tax credit for the payment of health insurance premiums, then the employee is protected from retaliation in response to his or her decision to take advantage of the credit.

These tax credits, as well as the subsidies under 42 U.S.C. § 18071, were enacted to make it easier for the middle class and working poor to obtain affordable health insurance, which is one of the main purposes of the

PPACA. Thus, it is clear *why* the anti-retaliation provision exists (without it, the act would protect against the middle class and working poor being ignored and excluded from health insurance but would not protect against them being retaliated against for exercising their new rights), however, it is unclear *how* this provision will be enforced or how plaintiffs would be able to prove that their employers terminated them or discriminated against them because of the employees' decision to take advantage of the tax credits and/or subsidies. In the absence of blatant discriminatory or retaliatory comments by employers, it is likely to be very difficult for employees to prove that their decision to take a tax credit or subsidy, which is generally unrelated to an employees' usual job duties and activities, was a contributing factor to the employer's retaliatory action.

Practical Applications of the New Law

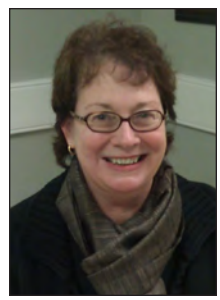
The Occupational Safety and Health Administration, which will administer the statute, has also been charged with drafting regulations to handle the investigation of retaliation complaints made pursuant to § 1558 of the PPACA. The regulations are scheduled to be released in in the near future.[8] The statute was enacted as part of the Fair Labor Standards Act, but the procedures for administering § 1558—including remedies, legal burdens of proof, complaint procedures, notifications, and statutes of limitation—will follow those enacted under the Consumer Product Safety Improvement Act, 15 U.S.C. § 2087(b).

What follows is a general summary of what to expect from the regulations. The Consumer Product Safety Improvement Act has a 180-day statute of limitations and requires the moving party to make a prima facie showing that his or her protected action was a contributing factor to the adverse employment action that was taken. The complaint must be filed with the secretary of labor. Once the employee has made a prima facie showing, the employer has the burden to show that he or she would have taken the same employment action even in the absence of the employee's protected action. The employer is faced with a "clear and convincing" burden of proof. Equitable and legal remedies are available, including reinstatement, back pay, compensatory damages, costs, and attorneys' fees. However, the PPACA includes protection for employers as well. If the secretary of labor determines that the employee's action was frivolous, the complaining party can be ordered to pay up to $1,000 of the employer's attorneys' fees. The act also allows for review in federal court. If the secretary of labor has not issued a final order within 210 days after a complaint has been filed or within 90 days after a written determination has been issued, then an employee can file a civil action in the appropriate U.S. district court.

Outlook for the Future

As previously mentioned, the outlook for the effectiveness of the PPACA's anti-retaliation provision depends on upcoming court rulings regarding the constitutionality and severability of the act. If the act remains in effect and if complaints pursuant to the PPACA's anti-retaliation provision follow the trend of complaints made pursuant to other anti-retaliation laws, then the Department of Labor may receive an abundance of complaints from aggrieved employees. A recent search of case law found no published cases involving complaints pursuant to the anti-retaliation provision of the Consumer Product Safety Improvement Act, but the provision has only been in effect for approximately three years.

Without the guidance provided by any published case law, it is difficult to predict how courts will interpret both the statutory provisions of the Consumer Product Safety Improvement Act and § 1558 of the PPACA, which is modeled after the Consumer Product Safety Improvement Act. Even though the anti-retaliation provision included in Title VII of the Civil Rights Act uses a different proof scheme, the Supreme Court's recent rulings in *Burlington* and *Kasten* could arguably be applied to cases brought pursuant to the PPACA's anti-retaliation provision. Even if the rulings are not directly applicable, the combination of the Supreme Court's recent tendency to broaden the scope of anti-retaliation provisions, the increased protections for mistreated employees, and the new Obama federal court appointees may have an impact on the courts' perspectives regarding the significance of cases charging retaliation under the Patient Protection and Affordable Care Act. **TFL**



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Endnotes

[1]29 U.S.C.S. § 218c (LEXIS, current through June 2011).

[2]*Florida v. United States HHS*, No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822 (N.D. Fla. Jan. 31, 2011).

[3]Cari Tuna, *Employer Retaliation Claims Rise*, Wall St. J. at B7 (Oct. 5, 2009).

[4]29 U.S.C. § 218c(a)(2) (LEXIS, current through June 2011).

[5]29 U.S.C. § 218c(a)(3)–(4) (LEXIS, current through June 2011).

[6]29 U.S.C. § 218c(a)(5) (LEXIS, current through June 2011).

[7]29 U.S.C. § 218c(a)(1) (LEXIS, current through June 2011).

[8]Curtis W. Copeland and Maeve P. Carey, Congressional Research Service, Upcoming Rules Pursuant to the Patient Protection and Affordable Care Act 26 (2011).