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New Law Gives Expanded Whistleblower Protection to Health Care Workers

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On April 2, 2002, Governor Pataki signed into law Labor Law section 741 specifically addressed to protecting health care workers who report incidents of improper patient care. The statute prohibits retaliation against health care workers who report violations to their employer or government agencies. Aggrieved individuals can maintain a lawsuit for damages including reinstatement, back pay, and attorney's fees. Employers are also liable for fines of up to $10,000.

Although New York already had a whistleblower law protecting the general work force from retaliation (Labor Law section 740), the new statute goes much further in scope offering greater protection to health care workers and stiffer penalties against noncompliant employers. According to the New York State Assembly's Memorandum in Support of the law, the changes were made "to encourage reporting of improper quality of patient care." The theory is that by offering stronger protection to health professionals, they will more likely report incidents of improper patient care that they previously were reluctant to report for fear of reprisal from their employer.

In light of the passage of Labor Law section 741, employers must be extra cautious in how matters of discipline are handled following an employee's report of improper patient care. More significantly, covered health care employers must give greater attention to documenting employee poor performance and other misconduct at all times so that a record exists to defend effectively a potential claim of whistleblower status.

What the New Law Provides
Labor Law section 741 applies to any facility licensed under Article 28 or 36 of the Public Health Law. These facilities include hospitals, diagnostic centers, treatment centers, dental clinics, rehabilitation centers, nursing homes, out-patient clinics, and home care services agencies.

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The new law enables an employee to report free from fear of retaliation "improper quality of patient care." That phrase is defined in the statute to mean "any practice, procedure, action or failure to act of an employer which violates any law, rule, regulation or declaratory ruling adopted pursuant to law, where such violation relates to matters which may present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient." This standard expands the coverage of the whistleblower statute applicable to the general workforce. The general whistleblower statute protects only reports of dangers to public health and safety. The new statute, however, is not so limited; it also protects reports of dangers or potential dangers to *individual patients*.

In addition, the new law prohibits an employer from retaliating against an employee who:

(a) discloses or threatens to disclose to a supervisor, or to a public body an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care; or

(b) objects to, or refuses to participate in any activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care.

The above-noted prohibitions also expand the prohibitions set forth in Labor Law section 740 applicable to the general work force. Under section 740, the disclosure or objection by the employee must concern an actual violation of law. Under section 741, however, health care employees are protected even if their disclosure or objection is based upon a *reasonable belief* that there was improper quality of patient care. This significant difference in coverage permits health care workers to assert complaints even if the employer did not actually violate a law, so long as the employee had a reasonable belief that such a violation occurred. Although it will take time for courts to interpret the scope of the term "reasonable belief," it is clear that it is a far lower standard than demonstrating that there was an actual violation.

Another important aspect of the health care whistleblower statute concerns an employee's reporting obligation. Under ordinary circumstances, an employee will be required to bring the improper quality of patient care to the attention of his or her supervisor and to afford the employer "a reasonable opportunity to correct such activity, policy or practice." However, Labor Law section 741 also provides that if an employee reasonably believes that the improper quality of patient care "presents an imminent threat to public health or safety or to the health of a specific patient" and that reporting to a supervisor would not result in corrective action, the employee may bypass the supervisor and report the incident directly to a government agency.

Employee Remedies

A successful whistleblower is entitled to reinstatement to the same or equivalent position with full benefits and seniority, back pay and benefits, and attorney's fees. In addition, should a court find that the employer acted in bad faith, the court may assess the employer a penalty in an amount up to $10,000. Further, the time within which an aggrieved employee may bring suit is two years, expanding the one-year statute of limitations applicable to non-health care workers.

Employer Defense

The legislature recognized that employers frequently take legitimate disciplinary action against employees subsequent to asserted complaints, which action is unrelated to those complaints. For example, an employee may complain about poor patient care. One week later, that same employee may engage in unsatisfactory behavior of a type that has been persistent for an extended period of time. An employer may wish to legitimately discipline that employee for the behavior. However, on the heels of the earlier complaint, the employer would be concerned that the discipline could be viewed as an act of retaliation for the complaint. Accordingly, Labor Law section 741 provides that in defending a claim of improper retaliation under section 741, an employer may assert that the personnel action taken was predicated upon grounds other than the employee's exercise of any rights protected by the statute. In this regard, however, it is critical for health care employers to document poor performance and other issues of misconduct at the time they arise so that the events are memorialized in the employee's personnel file. Then, should an employee be disciplined

following a complaint covered by section 741, the employer can credibly argue that the action was taken for previously documented reasons of unsatisfactory performance or behavior. On the other hand, should an employer not have a well documented file, it will be difficult to rebut an employee's claim that the adverse personnel action was not taken because of his or her complaint about improper quality of patient care.

Conclusion

Because of the obvious importance of preventing poor patient care, and in light of the significant protections provided by Labor Law section 741, employers can expect to find an increase in reports of poor patient care by their employees. With this in mind, there is no time like the present to impress upon supervisory staff the importance of maintaining fully documented personnel files. Such proactive steps will go a long way in defending a claim that an employee's termination for poor performance was actually taken in retaliation for whistleblowing activity.