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Whistleblower Claims on the Horizon Amid COVID-19 Pandemic

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In recent weeks, there have been numerous widely reported incidents of employees, particularly those in the health care industry, claiming that they have been retaliated against for reporting health and safety concerns related to COVID-19. Such complaints are indicative of the kinds of whistleblower and retaliation claims employers are likely to see in the near future as a result of the COVID-19 pandemic.

In fact, on April 8, 2020, the Occupational Health and Safety Administration ("OSHA"), which according to a recent Washington Post article has received thousands of complaints from employees regarding a lack of protections against COVID-19 in their workplaces, issued a press release "reminding employers that it is illegal to retaliate against workers because they report unsafe and unhealthful working conditions during the coronavirus." Below are some of the whistleblower protections and anti-retaliation statutes employers should be mindful of during the COVID-19 pandemic.

Occupational Health and Safety Act of 1970

Section 11(c) the Occupational Health and Safety Act of 1970 ("OSH Act") prohibits employers from retaliating against employees for exercising their rights under the statute, including raising a health or safety complaint with OSHA. 29 U.S.C. § 660(c). The protections contained in Section 11(c) apply to employees who report conduct they reasonably and in good faith believe violates the OSH Act. Although Section 11(c) does not provide for a private cause of action, employees can submit a complaint to the Secretary of Labor. After investigating the employee's complaint, the Secretory of Labor can sue the employer in federal court on the employee's behalf. In court, the Secretary of Labor may seek relief including reinstatement, back pay with interest, compensatory damages, punitive damages and other appropriate relief.

Section 5(a)(1) of the OSH Act, which is referred to as the "General Duty Clause," provides that employers must provide employees a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to [the employer's] employees." 29 U.S.C. § 654(a)(1). Additionally, OSHA enforces regulations that are specific to health concerns associated with COVID-19, including:

- 29 C.F.R. § 1910, Subpart I, which sets forth OSHA's Personal Protective Equipment standards and requires the use of gloves, eye and face protection, and respiratory protection by employees in certain industries; and
- 29 C.F.R. § 1920.134, which sets forth OSHA's Respiratory Protection Standard and provides that when respirators are necessary to protect workers, employers must implement a comprehensive respiratory program. OSHA recently issued a temporary guidance related to the enforcement of respirator annual fit-testing requirements for health care workers during the COVID-19 pandemic.

OSHA recently published a document entitled Guidance on Preparing Workplaces for COVID-19, which contains recommendations to assist employers in providing a safe and healthful workplace during the COVID-19 pandemic.

An adverse employment action taken by an employer in response to an employee's reasonable, good-faith complaint that the employer has violated any of the provisions discussed above, or any other relevant provision of the OSH Act, potentially could serve as a basis for a retaliation claim under Section 11(c).

National Labor Relations Act

Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("NLRA") prohibit employers from retaliating against an employee for, among other things, participating in "concerted activities." 29 U.S.C. § 158(a). A recent National Labor Relations Board ("NLRB") decision, *Maine Coast Regional Health Facilities*, NLRB, 01-CA-209105, 01-CA-212276 (March 30, 2020), indicates that healthcare workers who are terminated for voicing concerns about working conditions in health care facilities may have a retaliation claim under the NLRA.

In *Maine Coast*, a hospital employee submitted a letter to the editor of a local newspaper, "discussing staffing shortages at the hospital and the impact on her and her coworkers' working conditions, and expressing support for the [local] nurses' union's efforts to improve staffing levels." After the newspaper published the letter, the hospital discharged the employee, citing a violation of its media policy as the reason for her termination. The hospital's media policy, which is similar to those of many health care facilities, provided in relevant part "[n]o [hospital] employee may contact or release to news media information about [the hospital] . . . without the direct involvement of the [hospital] Community Relations Department." The NLRB held that such a policy restricted the employee's right to publicly complain about workplace issues of common concern to all employees, and therefore, the employee was "discharged for engaging in protected concerted union activity in violation of Section 8(a)(1) and 8(a)(3)."

New York Whistleblower Statutes

New York has two whistleblower statutes—New York Labor Law § 740 and New York Labor Law § 741—that may be relevant to claims arising from COVID-19, but differ from one another in significant respects, as discussed below. As we have previously reported, the New York whistleblower statute, New York Labor Law § 740, protects employees from retaliation for reporting a violation of the law that "creates and presents a substantial and specific danger to the public health or safety." N.Y.L.L. § 740(2)(a). Notably, an employee's good-faith belief that his or her employer engaged in a violation of the law is not sufficient to sustain a claim under § 740. Rather, the employee must show that the employer engaged in an "actual violation" of a safety statute or regulation. Additionally, the harm that results from the violation of which the employee complains must affect the "public-at-large," not just the individual employee.

New York Labor Law § 741 is specific to health care employees and protects such employees from retaliation for disclosing or objecting to "an activity, policy or practice of [the employee's] employer . . . that the employee, in good faith, reasonably believes constitutes improper quality of patient care." N.Y.L.L. § 741(2). Thus, § 741 differs from § 740 in that, under the former provision, health care employees are only required to show they had a reasonable, good-faith belief that the employer engaged in a violation of the law. Additionally, whereas § 740 prohibits retaliation on the basis of complaints that affect the "public-at-large," § 741 protects health care employees who report violations "which may present a substantial and specific danger to public health or safety *or* a significant threat to the health of a specific patient." N.Y.L.L. § 741(1)(d) (emphasis added).

California Whistleblower Statutes and *Tameny* Claims

California has several statutes under which employees could potentially make a whistleblower or retaliation claim, some of which are specific to health care workers. These statutes include the following:

- California Health and Safety Code § 1278.5, which was enacted to "encourage . . . nurses, members of medical staff, and other health care workers to notify government entities of suspected unsafe patient care and conditions." Health & Saf. Code § 1278.5(a). To that end, the statute prohibits health care facilities from retaliating against an "employee, the medical staff, or other health care worker of the health facility" for presenting a complaint to the facility or an entity or agency responsible for accrediting or evaluating the facility or initiating an investigation related to "the quality of care, services, or conditions at the facility." *Id.* § 1278.5(b)(1).
- California Labor Code § 6310, which prohibits employers from retaliating against employees for complaining about employee safety or health. Lab. Code § 6310(a)(1).
- California Labor Code § 6311, which prohibits employers from retaliating against employees for refusing to perform work that would result in the violation of any occupational safety or health law and would "create a real and apparent hazard to the employee or his or her fellow employees."

Additionally, employees in California may bring a common law claim for retaliation in violation of public policy, otherwise known as a *Tameny* claim. The conduct underlying a *Tameny* claim must implicate a fundamental public policy that is embodied in constitutional or statutory provisions. Among the policies that can give rise to a *Tameny* claim are protections against retaliation for reporting unsafe working conditions, including those encompassed in the California Health and Safety Code § 1278.5. Thus, employers should be aware that California employees may bring a *Tameny* claim in addition to claims arising under California's whistleblower statutes.

Additional State Whistleblower Protections

Other state statutes also protect employees against retaliation on the basis of reporting health and safety concerns. Examples of such statutes include the following:

- Illinois' Hospital Report Card Act, which prohibits hospitals from retaliating against employees for reporting "any activity, policy or practice of a hospital that . . . the employee reasonably believes poses a risk to health, safety, or welfare of a patient or the public." 210 ILCS 86/35.
- Michigan's Health Facility Whistleblower Protection Act, which prohibits health care facilities from retaliating against employees who make a good-faith complaint that their employer has violated a statute or rule. MCL 333.20180.
- New Jersey's Conscientious Employee Protection Act ("CEPA"), which prohibits employers from retaliating against an employee for objecting to, or refusing to participate in, any activity, policy or practice which the employee reasonably believes is in violation of a law, rule or regulation issued under the law, or if the employee is a licensed or certified health care professional, constitutes improper quality of patient care. J.S.A. § 34:19-3(c).
- Texas Health and Safety Code § 161.134, which prohibits hospitals from retaliating against employees for reporting a violation of law or an agency rule, including prohibitions against unethical or unprofessional conduct.
- Washington Code § 43.70.075, which prohibits health care facilities from retaliating against employees for making a good-faith complaint about improper quality of care provided by the facility.
- Wisconsin's Health Care Worker Protection statute, which prohibits health care employers from retaliating against employees for reporting violations of law or situations in which the quality of health care services provided by the facility violate any established clinical or ethical standard. WI Stat. § 146.997.

Common Law Retaliatory Discharge Claims In Various States

In addition to California, over half of the states recognize a common law cause of action for retaliatory discharge based on a violation of public policy. Here are some examples of states that recognize such a claim:

- As we have previously reported, Illinois recognizes a common law cause of action for retaliatory discharge in violation of public policy. The Illinois Supreme Court has recognized a retaliatory discharge cause of action where a plaintiff claimed he was discharged for refusing to engage in activity that allegedly violated safety-related regulations. *See* *Wheeler v. Caterpillar Tractor Co.*, 108 Ill.2d 502 (1985).
- New Jersey has recognized a common law cause of action for retaliatory discharge. To sustain such a claim, a plaintiff must show his or her discharge was contrary to a clear mandate of public policy. *See* *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980).
- Washington, D.C. has recognized a common law cause of action for wrongful termination where an employee was discharged for refusing to engage in illegal activity. *See* *Adams v. Cochran & Co., Inc.*, 597 A.2d 28 (1991). The D.C. Court of Appeals expanded the applicability of this claim, allowing a plaintiff who alleged she had been discharged from her job as a nurse in violation of public policy because she advocated for patients' rights to proceed on a wrongful termination claim. *See* *Carl v. Children's Hospital*, 702 A.2d 159 (1997).

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