ACA RETALIATION CLAIMS RECEIVE LITTLE FANFARE
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With 13,000 pages of federal regulations issued by the IRS, DOL and HHS concerning the ins and outs of the Affordable Care Act, one would think that employers would have heard more about the anti-retaliation provisions of the ACA, 29 U.S.C.§218c. Interestingly enough, one could have read all 13,000 pages of the regulations and still missed any meaningful discussion about the ACA "whistleblower" provision. This is because the IRS, DOL and HHC do not investigate or prosecute ACA retaliation claims. So who does? OSHA. That's right. If you believe that you have been retaliated against by your employer because you engaged in ACA protected activity, you must file an administrative complaint within 180 days with OSHA.

OSHA's Interim Final Regulations define ACA protected Activity as:

- Receiving a tax credit under §36B of the Internal Revenue Code;
- Receiving a tax subsidy under §1402 of the ACA;
- Providing of causing to be provided to the employer, the federal government, or a state attorney general information relating to any ACA violation;
- Being about to provide or cuse to be provided to the employer, the federal government, or a state attorney general information relating to any ACA violation or any act or omission the employee reasonably believes to be an ACA violation;
- Providing testimony, or being about to provide testimony concerning an alleged ACA violation;
- Assisting or participating in, or being about to assist or participate in, a proceeding regarding an ACA violation or any act or omission the employee reasonably believes to be an ACA violation; or
- Objecting to, or refusing to participate in, any activity, policy, practice or assigned task that the employee (or other such person) reasonably believes to be in violation of the ACA, or any order, rule, regulation, standard or ban under the ACA

The proofs are similar to those in FLSA retaliation claims. Employees must establish that the protected activity was a contributing factor in the adverse employment action and the employer must show through clear and convincing evidence that it would have taken the same adverse action in the Absence of the protected activity. To adequately protect themselves from such claims, employers should adopt an internal complaint mechanism which allows employees to bring their health-insurance-complaints to one or more persons who are not in the direct line of supervision. This minimizes the prospect that a supervisor will make an adverse employment decision based upon the employee's complaint. The complaint procedure must contain an anti-retaliation provision. Employers should also double-up their efforts to document all of their employment related discipline decisions and memorialize their legitimate, non-retaliatory business decisions.