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Idaho's New Healthcare Whistleblower Law

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A new Idaho law gives a broad private cause of action to actual or alleged whistleblowers in the healthcare industry. The statute will increase the risk and cost to health care employers and organizations who want to take any kind of adverse action against employees, contractors, medical staff members, or other individuals no matter how much such action is warranted.

I. Conscience Protections. The new Medical Ethics Defense Act, Idaho Code § 54-1301 *et seq*., generally protects the conscience rights of healthcare providers. Under the statute, "[h]ealth care providers[1] … shall not be required to participate in … a medical procedure, treatment, or service that violates such health care provider's conscience." [2] (I.C. § 54-1304(1)). Furthermore, "[n]o health care provider shall be discriminated against in any manner as a result of exercising the right of conscience…." (*Id*. at § 54-1304(6)).

> "Discrimination" or "discriminated against" means any adverse action taken against, or any threat of adverse action communicated to, any health care provider as a result of exercising [conscience] rights pursuant to sections 54-1304 and 54-1305, Idaho Code. Discrimination includes but is not limited to any penalty or disciplinary or retaliatory action, whether executed or threatened….

(*Id*. at § 54-1303(2)). The language is quite broad: in addition to adverse employment action, it would likely extend to adverse contract, credentialing, and other actions against contractors, medical staff members, and persons with clinical privileges.

II. Whistleblower Protections. Much more alarming, the statute's whistleblower protections extend beyond licensed healthcare providers and the exercise of conscience rights. The statute states:

> no health care provider shall be discriminated against in any manner because the health care provider disclosed any information that the health care provider reasonably believes evinces:

> (a) Any violation of any law, rule, or regulation;
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> (b) Any violation of any ethical guidelines for the provision of any medical procedure or service; or
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> (c) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(I.C. § 54-1305(2)). Per the statute:

> Any party aggrieved by any violation of this chapter may commence a civil action and shall be entitled, upon the finding of a violation, to:
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> > (a) Injunctive relief, when appropriate, including but not limited to reinstatement of a health care professional's previous position, reinstatement of board certification, and relicensure of a health care institution or health care payer;
> >
> > (b) Actual damages for injuries suffered; and
> >
> > (c) Reasonable costs and attorney's fees.

(*Id*. at § 54-1307(2)). The net effect is that health care professionals (including but not limited to techs, aides, assistants, students and employees of hospitals, clinics, nursing homes or facilities) can now sue if any kind of adverse action is taken or threatened in relation to or after any such person raised any concerns about compliance, mismanagement, patient care or the amorphous "abuse of authority." Employees and other individuals hoping to keep their job, contract, position or clinical privileges will be able to assert such complaints as a preemptive or defensive tactic to avoid adverse action. The statute is a plaintiff lawyer's dream and will increase the risk and costs to health care employers and organizations who take any adverse action against individual providers or employees despite the justification.

III. Limitations and Defense. There are some limitations or defenses to a whistleblower claim under the statute. First, a plaintiff would have to establish that the adverse action was taken "because" they "disclosed" the alleged violation of law, rule or ethical guidelines, mismanagement, or abuse of authority, *i.e*., there must be a causal nexus between the

disclosure of the triggering misconduct and the adverse action. (I.C. § 54-1305(2)). The problem for healthcare entities, of course, is that the triggering misconduct is quite broad: it is easy for the plaintiff to raise or manufacture such a complaint before or after the fact. The healthcare entity will be left to prove the action was taken for legitimate reasons and not because of the plaintiff's actual or alleged disclosure.

Second, the whistleblower statute does not apply if the triggering "disclosure is specifically prohibited by law." (*See Id*. at 54-1305(2)). It would be a rare situation in which such disclosures are prohibited by law if made—or alleged to have been made—to proper authorities or to persons within the organization.

Third, the statute "shall not apply when the disclosure concerns the lawful exercise of discretionary decision-making authority **unless** the health care provider reasonably believes that the disclosure evinces a violation or misconduct listed in subsection (2) of this section," *i.e*., the violation of law, rule, ethical guidelines, mismanagement or abuse of authority. (*Id*. at § 54-1305(3)). The problem here is that the defense apparently turns on the subjective belief of the plaintiff: although the plaintiff's belief must be "reasonable," it does not necessarily need to be valid or accurate.

Fourth, if the plaintiff is an employee, the statutory protections

> shall not apply if an employee is unable to perform any essential function,[3] the employer cannot transfer the employee to a suitable alternative position for which the employee is qualified, and the employer is otherwise unable to reasonably accommodate the employee without imposing an undue hardship on the employer.

(*Id*. at § 54-1304(12)).

IV. Next Steps. Employers often deal with whistleblower concerns in other contexts, but the new statute expands the scope and potential claims beyond employment situations and provides a statutory cause of action for plaintiffs. If they have not done so, health care employers and organizations should immediately discuss the scope and potential application of the new law with their leadership teams, human resources department, medical staff services office, and legal department and implement appropriate policies or practices to minimize liability. They should carefully consider the risk of a whistleblower claim before taking any adverse action, including evaluating whether the individual has raised concerns that might trigger the statute; the justification and timing of the action; and the documentation or other evidence supporting the proposed action or possible complaint. And remember that the statute is not limited to employment relationships but may extend to other situations in which adverse action against is taken against healthcare providers, contractors, or persons providing services in a facility or clinic.

Unfortunately, the new statute is an example of the broad and perhaps unanticipated adverse consequences of well-intentioned legislation if not carefully vetted or drafted.

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[1] "'Health care provider' means a health care professional, health care institution, or health care payer." (I.C. § 54-1303(7)). It includes but is not limited to doctors; nurses; clinical nurse specialists; nurse aides; physician assistants; medical assistants; allied health professionals, **employees of a hospital, clinic, nursing home, or pharmacy**; pharmacists and pharmacy technicians; faculty and students of a medical school, nursing school, or school of psychology or counseling; medical researchers and laboratory technicians; psychologists, psychiatrists, and counselors; and social workers. (*Id*. at § 54-1303(6), emphasis added).

[2] "'Conscience' means the ethical, moral, or religious beliefs or principles sincerely held by any health care provider." (I.C. § 54-1303(1)).

[3] "'Essential functions' means the fundamental job duties of an employment position. A function can be essential if, among other things, the position exists specifically to perform that function, there are a limited number of other employees who could perform the function, or the function is specialized and the individual is hired based on his ability to perform the function. The term does not include the marginal functions of a position." (I.C. § 54-1303(3)).
