How a Little Known Provision of Obamacare Will Create Legions of Federally-Protected Workers

A little-known provision of the Patient Protection and Affordable Care Act of 2010, better known as "Obamacare," has the potential to dramatically and permanently alter the landscape of America's work environment. Not only because the Act demands that American employers either "Pay or Play" when it comes to providing health insurance, but through a regulatory change that went unnoticed by major media.

There were several stories earlier this year, blog posts that went ignored by major media. In putting up The Obamacare Reporter, we found a very recent piece by attorney Steve Sutton, "Whistleblowing Protections Under the Affordable Care Act – It's the Law Now."As part of the sweeping and dramatic regulations issued by the administration, a 2011 amendment of the Fair Labor Standards Act grants protected status, aka Federal-guaranteed "whistleblower" protection, to any employee who receives a subsidy from one of the newly established State Health Insurance Exchanges, the organizations which are being set up to provide both access to, as well as Federal subsidies for, individually-purchased health insurance.

Federal Whistleblower protection has, until now, been reserved exclusively for those brave individual employees who risk their jobs by offering hidden-by-employer information concerning serious, substantial and even life-threatening issues – as well as criminal behavior – which that individual's employer is either compliant with or directly responsible for creating.

Whistleblowers are a Federally-protected class of employees. The Occupational Safety and Health Administration (OSHA) oversees the Federal Whistleblower Protection Program, and OSHA is responsible for defending the rights of those who are granted official Federal Whistleblower protection.

That agency specifically lists – as types of protections – Federal protections against firing or layoffs, as well as blacklisting, demoting, disciplining, denying benefits, failure to hire or rehire, intimidation, threats, reassignment, and reducing pay or hours. Even the denial of overtime work or promotions are protections offered to Federal Whistleblowers.

In short, Federal Whistleblower protections are enough to make a union steward salivate.

A protected employee becomes, in effect, untouchable. He cannot be fired, or shifted into another job, or reduced in hours or pay. He cannot be left out of meetings, or suffer any "intimidating" remark. He cannot *not* be hired – or *not* rehired if he is let go. He cannot be denied benefits, and he cannot be disciplined.

The guarantees offered to Federal Whistleblowers under the Fair Labor Standards Act does not consider performance as giving an employer justification for any of the above job-related

activities. In effect, a person granted “Federal Whistleblower” status is essentially immune to all the factors which govern the normal work environment. He or she enters a truly “protected” class of employees.

In essence, a Federal Whistleblower is offered more protections than are so notoriously offered to employees in France – and remember, once a person is hired in France, that person cannot work long hours (even if he wants to) – he must take extended vacations, and he cannot be laid off for essentially any reason short of the company going under.

Considering the risks an individual has had to take in order to be granted Federal Whistleblower status, until now, those whistleblowers were rare finds in the workplace. In fact, the protections offered to whistleblowers are intentionally sp onerous – to employers – that the protection itself is seen as strong motivation for employers to avoid the kinds of negligent, callous or even criminal activities that could “create” a whistleblower.

However, beginning on January 1, 2014, Obamacare’s new rules will change that. Under this new law, as soon as their companies decide to NOT provide health insurance – though the government is making it very attractive for employers to just “pay the fine” – millions of Federally-protected Whistleblowers will suddenly appear on the job scene.

Who will become whistle blowers? The busboy clearing a table – the guy who fixes your leaky sink – the clerk behind the counter at the convenience store – as well as virtually every full-time employee who doesn’t receive officially-approved on-the-job health insurance – they will become whistleblowers.

Complicating this, the Government has indicated its approval of employer-offered “skinny” insurance” coverage that is so incomplete that it will force even “officially-covered” employees to go to the Exchanges for help in getting more complete health coverage. In this way, even officially “insured” employees will become whistleblowers.

This will happen just as soon as they start receiving their health insurance – along with the Federal subsidies to which they’ll be entitled because they’re low-wage workers –through the Exchanges set up to provide individual health insurance.

The moment they sign up at their local Exchange, each one of those workers will suddenly and irrevocably become protected by OSHA – as whistleblowers – from any kind of discipline at work. They’ll be protected from any firing – even for cause – as well as any unwanted reassignment, and any demotion or wage reductions. Their hours can’t be cut – their requests for vacations must be honored – their sick leave can’t be questioned. They will even be protected from an even unintentional or misunderstood “stern word” from their bosses. These suddenly Federally-protected whistleblowers must also be included in company meetings or they can claim that they have been “blacklisted.”

Almost any discipline, any change in work hours or pay, any change in benefits or denials of special treatment will suddenly, literally, become a Federal offense.

Imagine what it will be like for employers, trying to motivate these "protected" individuals to do an honest day's work for an honest day's pay – or even to follow company policy.

What lunacy could bring about such sweeping, devastating change, a change that will occur across the nation on January 1, 2014? For the answer, just ask the regulators at the Department of Labor.

It was a regulatory change, made by unelected officials, that was signed into law with the stroke of a pen, then published in the Federal Register on April 5, 2011, and put into effect in May of that year. The 2011 regulatory amendments made to the Fair Labor Standards Act have gone unnoticed even by the most astute business and healthcare media. Perhaps the Obama administration was successful in having these new regulations buried beneath an estimated 20,000 of healthcare-specific regulatory pages of new rules issued by the Obama Administration since the passing of the Affordable Care Act (ACA) in 2010.

The ACA itself was hefty enough, representing in draft form some 2,000 pages of law it was so extensive that then House Speaker Nancy Pelosi famously said that Congress would have to pass it before they could know what was in it. Lengthy as it was, however, the ACA itself was just the beginning. The Internal Revenue Service – chief enforcer of all financial aspects of the law, including corporate and individual compliance with the universal coverage mandate, and collectors of the penalties and fines that the Supreme Court has chosen to see as "taxes" – was forced to issue massive regulatory papers describing in detail a "full-time" employee, and how employers might go about figuring out whom they are supposed to insure, or pay a fine if they fail to insure.

The ACA – which could be called the "Whistleblowers-R-Us Act" – was amended to include protected status for any employee who receives a subsidy for health insurance from an Exchange. The reasoning behind this amendment appears to be that if an employee discloses that his employer has failed to provide affordable health insurance, then this employee has become a "whistleblower" who is reporting on the employer's willful neglect of providing the benefit.

This convoluted logic might have at least remotely made sense if the money required to be paid by corporations to the government for not providing health insurance was considered a fine for a kind of civil wrong-doing. However, in 2012, the Supreme Court ruled this payment is a tax, not a fine or other penalty. Under the ACA law, the Federal Government will be requiring each "large employer – any organization which employs more than 50 full-time employees – to report on the status of the insurance they provide to those employers. No Federally-protected Whistleblowers are needed to root out malefactors – the IRS has always proved effective in taxing businesses without the help of millions of whistleblowers.

Tortured logic aside, the administration announced on July 2nd – two days before the Federal Independence Day holiday, which is a great place to bury controversial news to ensure that it receives minimal press coverage – that it was delaying the penalties employers faced for not providing insurance until January 1, 2015. However, this was no favor to employers. While employer reporting has been delayed for a year, the requirements that were to have been reported – including especially employee notification of the employers' plans regarding the employers' provision of health insurance as a company benefit – have not changed. A company which thinks that the requirements, as well as the reporting, have been delayed a year could find themselves in serious trouble, and that trouble could include a large number of employees who join an Exchange, and become de facto "whistleblowers."

Apparently unrelated to this "reporting holiday," but actually very much related to the whistleblower issue, the government issued news that involves the Exchanges. In fact, this announcement was made just two days earlier than the reporting waiver. It was made on a Friday, another great day to bury news. In this, the Federal Government announced that their Exchanges would not seek any verification of any kind as to whether persons applying to the Exchange actually qualify for subsidies, at least not in 2014. This will make subsidies widely available in 2014, including – potentially – to those who might also be insured at their employers.

Currently, the administration says it will start to require income verification beginning in 2015, though this – like the reporting deadline, may also change.

Wharton School of Business estimates that there are 5.7 million employers who have 50 or more employees, and who are there regulated under the ACA. With theses last-minute and little-understood changes in regulations and reporting requirements, the likelihood is that many US employers will find themselves employing whistleblowers. With the current confusion between reporting requirements and insurance requirements, it is almost certain that the number of employers in this situation could reach into the hundreds of thousands – it's possible that upwards of a million employers could find themselves employing individuals who receive a subsidy from an Exchange. Without income verification, and with no subsidy threshold needed to qualify for the OSHA protection of whistleblower status, the working landscape of America is likely to change overnight.

Allow us to be the first to wish America's employers a Happy New Year, 2014, as they wake up to discover that their workforce is now made up of Federally-protected whistleblowers.