

Loopholes in health care law could result in employee harassment

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The contrasting incentives of employers and employees under the Affordable Care Act ultimately may result in increased employee harassment and retaliation claims, two University of Illinois law professors say in a paper they co-wrote.

As firms grapple with the significant cost increases associated with the new [health care](#) legislation, the possibility emerges that employers would harass or retaliate against employees in order to avoid the law's financial penalties, according to Peter Molk and Suja A. Thomas.

"The Affordable Care Act incentivizes employers and employees to push in essentially opposite directions," said Molk, an expert in insurance law. "There are safeguards that have been enacted as part of the law, and some already exist to protect employees from what employers might do. But we've identified other areas of the law where it looks like employees aren't as protected as we would want them to be."

"No one is thinking about this aspect of the law right now as a potential issue, but it will no doubt happen as employers begin to actively attempt to minimize the costs they will incur under the law," said Thomas, an expert in [employment discrimination](#).

Under the Affordable Care Act, beginning in January 2015, qualified employers – that is, employers with 50 or more full-time employees – must provide [health care coverage](#) or face a fine. Employees also must obtain coverage or pay a penalty.

But given the incentives for employers under the new health care legislation, as well as the past experiences of workers under other discrimination laws, additional protection for workers is warranted, the scholars warn.

"The Affordable Care Act recognizes a lot of problematic interactions and provides protections for some of them," Thomas said. "For example, if an employer fires a worker for taking coverage offered by the employer under the act, the employee can sue for damages."

There are, however, still some very conspicuous holes, Thomas notes.

"For employers, there are three different options: They can provide adequate coverage, inadequate coverage or no coverage at all," she said. "In terms of loopholes, they could offer adequate insurance but could ask job applicants about their coverage in an attempt not to hire people who may seek coverage. They could offer inadequate insurance, but threaten employees not to elect coverage through the health exchanges, because then the employers would have to pay a fine. Or employers could offer no coverage at all and pay the fines, which do increase over time; it might be worth it if they calculate that they come out ahead monetarily by not offering coverage."

"Employers obviously would like to minimize costs as well as avoid any and all penalties, and one way of doing so is offering inadequate coverage and trying to get employees to avoid buying subsidized coverage through the individual exchanges," Molk said. "In this circumstance, what's not currently protected is the way that some employers could pressure employees or tell employees, 'Look, if too many of you go out and buy insurance this way, then we're going to have fire people or cut wages.' That's not protected, and that's something that we think should be protected in appropriate circumstances."

Employers also might restructure their workforce from full-time to part-time employees solely to avoid having to pay fines under the law.

In taking different actions, the employer's intentions may not always be clear. Polling employees – that is, employers asking employees the seemingly innocuous question whether or not they intend to purchase health insurance through their employer or through the exchanges – is something that could have good or bad intentions, Molk said.

"If they are ensuring that they're allocating enough money to covering health insurance costs or penalties; if they're asking to know what employees are doing so the employer isn't hit with some whopping bill at the end of the year – that's fine," he said. "There could be legitimate business intentions behind asking those types of questions, but there also could be employers who are doing it just as a means to identify the employees who are going to buy the employer-offered coverage or the subsidized individual coverage, which would impose some cost on the employers."

If the employers can identify those employees in advance, they could put some extra pressure on them to find other insurance – or even later fire them, some of which is protected, and some of which is not.

"It's a tricky issue," Molk said. "You want to prevent that undesirable behavior but we also don't want to keep employers from having some flexibility about determining what their future costs are going to be. You want to allow businesses to continue making legitimate, fundamental business decisions, but you also don't want them using it as a smokescreen for undesirable behaviors, like moving full-time workers to part-time hours just to avoid the Affordable Care Act."

"Actions undertaken purely to avoid the law's penalties – those types of things shouldn't be happening, but they undoubtedly will," Thomas said.

"So there are some actions that employers could potentially be doing – and probably are doing – given what we know about the Affordable Care Act."

According to the paper, in analogous contexts where employees raise retaliation claims after they have complained of discrimination, employee claims against employers have had a significant level of success. Comparable retaliation under the health care overhaul is likely, and perhaps will occur even more as a result of the significant specific costs that employers face under the health care law, the scholars say.

"Employees need to be aware of these conflicts, and Congress could patch these loopholes fairly easily before the law goes fully into effect," Molk said.

The only bad thing – Congress would have to take a vote on the issue.

"Given that the Obama administration has granted an extra year before the law fully goes into effect, it would be nice to be able to remedy those gaps and provide the protection that Congress intended," Thomas said.

"Congress has a year and a half to get its act together, and with all the coverage in the press and the backlash from employers, it's something that might now be higher up on their to-do list," Molk said.

Provided by University of Illinois at Urbana-Champaign

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