Investigator's Desk Aid to the Affordable Care Act (ACA) Whistleblower Protection Provision

Section 1558 of the Patient Protection and Affordable Care Act, Section 18c of the Fair Labor Standards Act

29 U.S.C. § 218c

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This Desk Aid represents the Occupational Safety and Health Administration's (OSHA's) summary of the scope of coverage and protected activity and the procedures for investigating and adjudicating retaliation complaints under section 1558 of the Affordable Care Act, codified at 29 U.S.C. § 218c, as of the "last revised" date listed below. This Desk Aid is intended for OSHA's use and the guidance herein is subject to change at any time. This Desk Aid is not a standard or regulation, and it neither creates new legal obligations nor alters existing obligations. There may be a delay between the publication of significant decisions or other authority under this whistleblower protection provision and modification of the Desk Aid. The Federal Register, the Code of Federal Regulations, and decisions of the Department of Labor's Administrative Review Board remain the official sources for the views of the Secretary of Labor on the interpretation of this whistleblower protection provision. The contents of this Desk Aid do not constitute interpretations of the Internal Revenue Service, the Department of Health and Human Services, or the Employee Benefits Security Administration.

Abbreviations used in this Desk Aid:

ACA	Used in this Desk Aid to refer to the anti-retaliation or whistleblower protection provision at section 1558 of the Affordable Care Act and codified at 29 U.S.C. § 218c
CPSIA	Consumer Product Safety Improvement Act whistleblower protection provision, 15 U.S.C. § 2087
FLSA	Fair Labor Standards Act, 29 U.S.C. § 201 et seq.
HHS	U.S. Department of Health and Human Services

IRS	Internal Revenue Service
OSHA	Occupational Safety and Health Administration
Title I	Used in this Desk Aid to refer to Title I of the Affordable Care Act
The Act	Used in this Desk Aid to refer generally to the Affordable Care Act

I. The ACA in a Nutshell

ACA prohibits employers from discharging or otherwise retaliating against employees for engaging in protected activity, such as reporting potential violations of Title I of the Act (which includes the Act's health insurance market reforms) or receiving a premium tax credit or a cost-sharing reduction subsidy when buying health insurance through a health insurance Marketplace (also called an Exchange) established pursuant to the Act.

ACA's anti-retaliation provision can be found at 29 U.S.C. § 218c. ACA incorporates the procedures, notifications, burdens of proof, remedies, and statutes of limitation of the Consumer Product Safety Improvement Act (CPSIA). The procedures for the enforcement of ACA's anti-retaliation provision can be found at 15 U.S.C. § 2087. The regulations implementing ACA's anti-retaliation provision can be found in 29 CFR Part 1984.

II. Covered Entities

ACA prohibits retaliation by employers against employees. Because the provision is part of the FLSA, the FLSA's broad definitions of "employer" and "employee" apply.

An "employee" is "any individual employed by an employer," excluding certain volunteers and agricultural workers employed by family members. 29 U.S.C. § 203(e), 29 CFR 1984.101(f).

An "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency[.]" 29 U.S.C. § 203(d); 29 CFR 1984.101 (g).

For purposes of the ACA's anti-retaliation provision, the term "employee" includes former employees and applicants for employment. 29 CFR 1984.101(f)(3).

III. Protected Activity under ACA:

An employee is protected from retaliation because the employee, or an individual acting at the employee's request, has:

(1) Received credit under Section 36B of the Internal Revenue Code or subsidy under Section 1402 of the Act;

(2) Provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or to a State attorney general information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of Title I (or amendment made by Title I);

(3) Testified or is about to testify in a proceeding concerning such violation;

(4) Assisted or participated, or is about to assist or participate, in such a proceeding; or

(5) Objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of Title I (or amendment made by Title I), or any order, rule, regulation, standard, or ban under Title I (or amendment made by Title I).

What types of complaints are protected?

The ACA protects employees who provide information relating to; testify, assist, or participate in investigations concerning; or object to or refuse to participate in; violations of Title I of the Act.

Title I of the Act has three main components: (1) health insurance market reforms; (2) coverage for all Americans; and (3) tax credits and cost-sharing reductions to ensure affordability. The provisions outlined below are not exhaustive.

More detailed information regarding Title I, is available at www.healthcare.gov, on the Employee Benefits Security Administration website at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act, on the HHS website at https://www.hhs.gov/healthcare/about-the-aca/index.html, and on the IRS website at https://www.irs.gov/affordable-care-act.

1. *Market reforms:* Title I of the Act provides for a number of health insurance market reforms. The market reforms are applicable to private group health plans and health insurers offering individual or group market health insurance coverage (plans and issuers).[1] Complaints regarding conduct that an employee reasonably believes violates these reforms would be protected activity under ACA. Following are some of the market reforms under the ACA[2]:

[1] Throughout this Desk Aid the term "plans" refers to employer-sponsored health plans; the term "issuers" refers to health insurers that issue health insurance policies to individuals.
[2] For a summary of market reform provisions please see: Application of Health Reform Provisions to Grandfathered Plans.

a. Title I requires recommended preventive care to be fully covered without any out-of-pocket expense.

b. Title I prohibits health insurance plans and issuers from denying or otherwise imposing any other limitation or exclusion of health insurance coverage because of a person's preexisting medical conditions.

c. Title I requires premium rates to remain consistent across rating areas, varying only according to coverage type or tobacco use. It also provides limitations on genetic testing and the collection of genetic information.

d. Title I provides that no employer or individual who applies for coverage can be turned away, and coverage must be renewable at the option of the plan sponsor or individual.

e. Title I prohibits plans and issuers from rescinding coverage except where the covered individual has engaged in fraud or made an intentional misrepresentation of fact.

f. Title I prohibits plans and issuers from discriminating with respect to coverage or plan participation against any health care provider operating within the scope of that provider's license or certification under applicable state law.

g. Title I requires that all individual and small group health insurance issuers cover essential health benefits enumerated in Section 1302(b), codified at 42 U.S.C. § 18022(b), and meet the cost-sharing requirements laid out in Section 1302(c), 42 U.S.C. § 18022(c).

h. Title I prohibits plans and issuers from applying a waiting period of longer than 90 days.

i. Title I requires that plans and issuers allow covered individuals to participate in certain approved clinical trials.

j. Title I prohibits plans and issuers from imposing lifetime limits on benefits and annual limits inconsistent with U.S. Department of Health and Human Services (HHS) regulations.

k. Title I requires plans and issuers that provide dependent coverage for children to continue to make such coverage available for those dependents until age 26.

l. Title I gives consumers, including covered employees and their dependents, the right to appeal healthcare coverage decisions that deny services or treatments.

m. Title I prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in health programs or activities that receive Federal financial assistance.

2. *Coverage for all Americans:* Under the employer shared responsibility provisions, if an employer meets the size threshold of employing 50 full-time employees or the equivalent, the employer may be required to make a shared responsibility payment to the IRS if (1) it does not offer health insurance to a sufficient percentage of its employees (and their dependents) that meets certain affordability and value criteria and (2) at least one employee receives a premium tax credit or cost-sharing reduction as a result of obtaining health insurance through the Health Insurance Marketplace ("the Marketplace").

   Pursuant to the Act, the "Marketplace" or the "Exchange" is a service that every state is required to establish in order to help individuals, families, and small businesses shop for and enroll in affordable health insurance and this service may be operated through State-Based Exchanges or through Federally-Facilitated Exchanges on Healthcare.gov.

   For more information regarding the IRS employer shared responsibility payments, please consult the IRS website at https://www.irs.gov/affordable-care-act/employers/employer-shared-responsibility-provisions.

3. *Tax Credits and Cost-Sharing Reductions to Ensure Affordability:* Title I includes provisions under which individuals may qualify to receive affordability assistance in purchasing, or accessing, qualified health insurance through the Exchanges if their employer does not offer coverage or offers coverage that doesn't meet certain minimum requirements. The amount of affordability assistance an individual is eligible for depends on the individual's family size and family income. Assistance comes in two forms: (1) a premium tax credit under Section 36B of the Internal Revenue Code which the individual may choose to have paid monthly by the federal government to the insurance issuer on the employee's behalf, and (2) a cost-sharing reduction subsidy under Section 1402 of the ACA that lowers out of pocket expenses for medical care, such as co-payments, deductibles, and coinsurance. An employer's retaliation against an employee for receiving either benefit violates the anti-retaliation provisions of the ACA.

To whom may an employee complain?

Complaints to an employer, the federal government, or the attorney general of a State are protected. Other forms of objection and refusals to violate any provisions of Title I of the ACA are also protected. ACA-protected activity also includes testimony, assistance, and participation in proceedings related to potential violations of Title I.

Must the employee report an actual violation of Title I?

ACA requires that a report or refusal to work relate to activity that the employee reasonably believes is a violation of Title I. The employee need not provide information regarding conduct that actually violates Title I. If the employee reasonably believes that the reported conduct is a violation, then the employee is protected. A report based on a reasonable but mistaken belief that conduct violates Title I is protected.

To have a reasonable belief, an employee must have a subjective belief (i.e., the employee must actually believe that a violation has occurred, is occurring, or is likely to occur), *and* the belief must be objectively reasonable (i.e., it must be possible that a reasonable person in the employee's position would share this belief). In determining whether the employee had an objectively reasonable belief, the employee's training, experience, and educational background are relevant. The employee's report would be a protected activity if a reasonable person with the same training, background, and experience would also believe that the relevant activity would constitute a violation.

Does the employee need to mention any specific provision of Title I to engage in protected activity?

The information that the employee provides to the employer, the federal government, or to a State attorney general must be specific enough in relation to a given practice, condition, directive, or event that affects the ACA to warrant an investigation. However, the employee does not have to specifically identify any provision of Title I that the employee believes is being violated.

Does the ACA protect work refusals?

Yes. Title I of the ACA explicitly protects employees from retaliation for objecting to, or refusing to participate in, any activity, policy, practice, or assigned task that the employee reasonably believes to be in violation of any provision of Title I or any amendment made by the Title.

What are some examples of ACA protected activity?

Example: Shelly works for a health insurance issuer in customer service. She has been receiving calls from customers who complain that the issuer is not covering immunizations that are recommended by the Centers for Disease Control and Prevention. Shelly tells her manager that she thinks this practice is illegal. One week later, Shelly is fired. Shelly files a retaliation complaint with OSHA. As long as Shelly reasonably believes that her employer is not covering required immunizations, she has engaged in ACA-protected activity. Title I requires issuers to cover, without cost sharing, services recommended by the Centers for Disease Control and Prevention. Docket and proceed with the retaliation investigation.

Example: Jim is an employee of a large employer that does not provide health insurance to Jim. He purchases health insurance through the Marketplace instead and receives a premium tax credit. Jim's employer then receives a letter from the IRS advising that Jim received the tax credit and that the IRS may assess an employer shared responsibility payment. The next day, the employer suspends Jim after warning him to "be a team player." Jim files a retaliation complaint with OSHA. Jim has engaged in ACA-protected activity by receiving the premium tax credit, a benefit under Section 36B of the Internal Revenue Code. Docket and proceed with the retaliation investigation.

Example: Larry is a claims specialist for a health insurance carrier. He is instructed to deny certain certified nurse midwives' claims for prenatal care based on the type of provider delivering the care. He refuses to do so and is given a negative performance review due to his insubordination. As a result of the negative review, he does not receive an annual bonus that the rest of his colleagues are awarded. Larry files a retaliation complaint with OSHA. As long as Larry reasonably believed that the certified nurse midwives were acting within the scope of their licenses and state certifications and that the same care would have been covered if provided by an MD, Larry's refusal to follow supervisor instructions to deny the claims would be protected activity related to Title I's provision prohibiting discrimination against health care providers acting within the scope of their licenses. Docket and proceed with the retaliation investigation.

Are there any categories of complaints that the ACA does not protect?

Provisions in other Titles of the Act other than Title I address Medicare and Medicaid reforms, electronic health records initiatives, jobs in the healthcare industry, and other topics. Because these provisions are not in Title I, complaining about these issues (such as reporting Medicare fraud) is not considered protected activity for purposes of the ACA anti-retaliation provision. Title I also does *NOT* address quality of patient care, conditions of health clinics and hospitals, or patient abuse. However, be sure to analyze whether the complainant's alleged protected activity may fall within another OSHA whistleblower statute. For example, retaliation against an employee for reporting Medicare/Medicaid fraud by a hospital may fall under the Sarbanes-Oxley Act (SOX) anti-retaliation provision if the hospital is publicly traded. Or someone who reported patient abuse may have also reported concerns about their personal safety, and thus such activity may be considered protected under section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. § 660(c).

See Attachment 2, *Healthcare Referral Chart*, for where to refer complaints that do not allege ACA-protected activity.

What are some examples of complaints that are <u>not</u> protected under the ACA?

Example: Carla is a nurse at a hospital. She calls OSHA and says she has been fired because she called the state hospital licensing board and reported patient abuse at the hospital. The state hospital licensing board did an inspection and fined the hospital. Carla was fired the next week. She would like to file a whistleblower complaint with OSHA. However, Title I does not include

provisions to address patient abuse. Carla may contact her state's Attorney General to inquire about retaliation protections. (See "Healthcare Referral Chart" below).

Example: Susan works at a hospital in the billing department. She notices that her supervisor is charging Medicare for treatments that patients are not receiving. She reports this to the HHS Centers for Medicare & Medicaid Services (CMS). Her boss finds out and fires her. Susan calls OSHA to inquire about her rights. Title I does not include provisions addressing Medicare/Medicaid fraud. For where to refer Susan, see the "Healthcare Referral Chart" below. (If Susan's hospital is publicly traded, she may have a SOX claim based on allegations that she complained of mail or wire fraud).

IV. Procedures:

The ACA incorporates the procedures, notifications, burdens of proof, remedies, and statutes of limitation of the CPSIA, 15 U.S.C. § 2087(b). Procedures for the investigation of ACA complaints can be found in 29 CFR Part 1984. Below is a summary of the procedural provisions most relevant to an OSHA investigation. More information is also available in the What to expect during an OSHA Whistleblower Investigation section of OSHA's website, OSHA's ACA Fact Sheet, and in the OSHA Whistleblower Investigations Manual.

A. Complaint

Who may file: An employee who believes that they have been retaliated against in violation of ACA may file a complaint with OSHA. The employee may also have a representative file a complaint on their behalf.

Form: The complaint need not be in any particular form. A complaint may be filed orally or in writing, including via OSHA's Online Complaint form. Oral complaints will be reduced to writing by OSHA. If the complainant cannot make a complaint in English, OSHA will accept the complaint in any language.

Timing: The complaint must be filed within 180 days of the date when the alleged adverse action took place or when the complainant learned of the adverse action. Equitable tolling principles may extend the time for filing in limited circumstances, consistent with the guidance in OSHA's Whistleblower Investigations Manual. For example, OSHA may consider the time for filing a complaint to be tolled if a complainant mistakenly files a complaint with an agency other than OSHA within 180 days after an alleged adverse action.

Distribution of complaints and findings to partner agencies: Complaints and findings in ACA cases should be sent to the Employee Benefits Security Administration (EBSA) of the Department of Labor, which will review and coordinate this sharing of information with the appropriate offices within IRS and HHS when necessary.

B. Investigation

Upon receiving a complaint, OSHA will evaluate the complaint to determine whether the complaint contains a prima facie allegation of retaliation. In other words, the complaint, supplemented as appropriate with interviews of the complainant, must allege that:

1. The employee engaged in ACA-protected activity;
2. The respondent knew or suspected that the employee engaged in ACA-protected activity;
3. The employee suffered an adverse action; and
4. The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

If the complaint meets these requirements, OSHA will ask for a position statement from the respondent and proceed with the investigation. If it does not, and the complainant does not agree to administrative closure of the case, OSHA will dismiss the complaint with notice to the complainant and the respondent of the right to request a hearing before a Department of Labor administrative law judge (ALJ).

ACA uses a "contributing factor" standard of causation. Thus, following the investigation, OSHA will find that retaliation occurred if it determines that there is reasonable cause to believe that ACA-protected activity was a contributing factor in the decision to take adverse action against the complainant and the respondent has not shown by clear and convincing evidence that it would have taken the same action in the absence of the protected activity. A contributing factor is a factor which, alone or with other factors, in any way affects the outcome of a decision.

If OSHA finds reasonable cause to believe that retaliation occurred, it will issue findings and a preliminary order stating the relief to be provided. The relief may include reinstatement, back pay, compensatory damages, other remedies for the retaliation (such as a neutral reference), and reasonable attorney's fees and costs.

If OSHA does not find reasonable cause to believe that retaliation occurred, it will issue findings dismissing the complaint.

If the complainant and respondent agree to settle the case during the investigation, they must submit the settlement agreement for OSHA's review and approval.

C. Administrative and Judicial Review

Either the complainant or the respondent may object to OSHA's findings within 30 days from the receipt of the findings and request a hearing before an Administrative Law Judge (ALJ). Filing objections will stay OSHA's order for all relief except reinstatement, which is *not* automatically stayed. If no objections are filed, OSHA's findings become the final order of the Secretary of Labor and are not subject to review.

The ALJ proceeding is a *de novo* adversarial proceeding in which both the complainant and the respondent have the opportunity to seek documents and information from each other in discovery and to introduce evidence and testimony into the hearing record. OSHA does not typically participate in the ALJ proceeding. Documents and other information submitted to OSHA during the investigation do not automatically become part of the record in the ALJ proceeding. However, both the complainant and the respondent may introduce in the ALJ proceeding evidence that they obtained or used during OSHA's investigation. The ALJ may hold a hearing or dismiss the case without a hearing if appropriate. Either the complainant or the respondent may appeal the ALJ's decision in the case to the Department of Labor's Administrative Review Board (ARB), which may either accept or reject the case for review. The ARB's decision is subject to discretionary review by the Secretary of Labor. A complainant or respondent may obtain review of a final, reviewable decision of the Department of Labor by appealing to the appropriate U.S. Court of Appeals.

D. Kick-Out Provision

ACA permits a complainant to bring a *de novo* action in federal district court if 210 days have passed since the filing of the complaint with OSHA, the Department of Labor has not reached a final decision on the complaint, and the delay is not due to the bad faith of the complainant. ACA also permits a complainant to bring a *de novo* action in federal district court within 90 days after receiving OSHA's findings, provided that the Secretary has not made a final decision.

Attachment 1: Optional Worksheet: Analyzing ACA Whistleblower Complaints

In order to issue merit findings, answers 1 to 9 must be "yes" and answer 10 must be "no."	Yes	No
Timeliness – (See Desk Aid p. 8)		
1. Was the complaint filed within 180 days of the alleged adverse action (or does tolling apply)?	☐	☐
Coverage – (See Desk Aid p. 2)		
2. Is respondent an employer within the meaning of the FLSA?	☐	☐
3. Is complainant an employee within the meaning of the FLSA?	☐	☐
Protected Activity (See Desk Aid pp. 2-8)		
4. Has complainant or someone acting at the request of complainant: a. Received benefits under Section 36B of the Internal Revenue Code or Section 1402 of the ACA? b. Provided, caused to be provided, or is about to provide or cause to be provided to the employer, the federal government, or the attorney general of a state information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of Title I of the ACA or any amendment made by Title I? c. Testified or is about to testify in a proceeding concerning such violation? d. Assisted or participated, or is about to assist or participate, in such a proceeding? e. Objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of Title I of the ACA or any amendment made by Title I?	☐	☐
5. For items 4(b) and 4(e), did complainant have a subjective belief that the conduct complained of violated the law?	☐	☐
6. For items 4(b) and 4(e), would a reasonable person with similar training, knowledge, and experience believe that a violation occurred, is occurring, or is likely to occur?	☐	☐
Employer Knowledge		
7. Did respondent know or suspect that complainant engaged in the protected activity? (Remember that knowledge may be imputed to respondent using a cat's paw theory or small plant doctrine if warranted by the evidence.)	☐	☐
Adverse Action		
8. Did respondent discharge or take other adverse action against the employee? (Adverse action is any action that could dissuade a reasonable employee from engaging in ACA-protected activity. Common examples include firing, demoting, or disciplining the employee.)	☐	☐
Nexus (Contributing Factor)		
9. Was complainant's ACA-protected activity a *contributing factor* in respondent's decision to take adverse action against complainant? Evidence that protected activity contributed to an adverse action includes, but is not limited to: • Close timing (temporal proximity) between the protected activity and the adverse action. • Evidence of hostility towards the protected activity. • Disparate treatment of complainant as compared to other employees following the protected activity. • Changes in respondent's treatment of complainant after the protected activity. • Indicators that respondent's stated reasons for the adverse action are pretext.	☐	☐
Affirmative Defense		
10. Is there clear and convincing evidence that respondent would have taken the same action against complainant absent the protected activity?	☐ No	☐ Yes

Attachment 2: Complaint Referral Chart

Occasionally, OSHA receives complaints that do not allege activity protected that falls under the ACA's anti-retaliation provision because the complainant reported or refused to participate in a perceived violation of a part of the ACA other than Title I or violations of state laws relating to quality of health care. In such instances, OSHA may refer the complainant to another agency, such as the Department of Labor's Employee Benefits Security Administration (EBSA) and/or other federal or state agencies that may have jurisdiction to address the allegations in the complaint. Below is a list of referral contacts for different common allegations that OSHA has been able to identify to date.

Reporting Quality of Patient Care

A complaint about the quality of care delivered by a doctor, hospital, or other provider.
*If this relates to long-term care facilities, or Elder Abuse, see below "Elder Justice Act."

What To Do

The complainant may contact the State Survey Agency to report the patient care issue. Information is available on the CMS website: https://www.cms.gov/medicare/health-safety-standards/quality-safety-oversight-general-information/contact-information.

For complaints regarding retaliation against an employee for raising concerns related to quality of patient care, the complainant may contact the state's attorney general's office or consult with their own counsel.

The complainant may also contact the HHS Office of the Inspector General (OIG) Hotline for either the underlying patient abuse complaint or a retaliation complaint:

Call: 800-447-8477
TTY: 800-377-4950
Online: https://oig.hhs.gov/fraud/report-fraud/
Mail: HHS Tips Hotline
P.O. Box 23489
Washington, DC 20026-3489

Reporting Elder Abuse

The purpose of the Elder Justice Act (Title VI, Subtitle H of the ACA) is to enhance and ensure the quality of long-term care and prevent abuse, neglect, and exploitation in long-term care. There are reporting requirements for reasonable suspicion of crimes against a long-term care facility resident or person receiving care from such facility.

A long-term care facility is prohibited from retaliating against an employee because the employee has engaged in lawful acts under this provision, such as reporting conduct the employee reasonably suspects is a crime related to elder abuse to law enforcement.

What To Do

The complainant may contact the State Survey Agency to report a reasonable suspicion that a crime has been committed against a long-term care facility resident, as well as local law enforcement. The State Survey Agency can be found on the CMS website: https://www.cms.gov/medicare/health-safety-standards/quality-safety-oversight-general-information/contact-information.

The complainant may also contact the HHS OIG Hotline:

Call: 800-447-8477 (800-HHS-TIPS)
TTY: 800-377-4950
Online: https://oig.hhs.gov/fraud/report-fraud/
Mail: HHS Tips Hotline
P.O. Box 23489
Washington, DC 20026-3489

Concerns regarding retaliation against an employee in violation of the Elder Justice Act may also be reported to State Survey Agency and to the HHS OIG Hotline.

Reporting Medicare or Medicaid Fraud, Waste, or Abuse

Medicare or Medicaid fraud occurs when someone knowingly deceives, conceals, or misrepresents to obtain money or property from one of these health care benefit programs. Medicare or Medicaid fraud is considered a criminal act.[3]

Waste is overusing services or other practices that directly or indirectly result in unnecessary costs to one of these health care benefit programs. Examples of waste include conducting excessive office visits, prescribing more medications than necessary, and ordering excessive laboratory tests.[4]

Abuse occurs when health care providers or suppliers perform actions that directly or indirectly result in unnecessary costs to one of these health care benefit programs. Abuse includes any practice that does not provide patients with medically necessary services or meet professionally recognized standards. Examples of abuse include billing for services

[3] Frequently Asked Questions (FAQs): Medicare & Medicaid Fraud, Waste, and Abuse Prevention Mini-Course & Podcast Series, available at FAQs: Medicare & Medicaid Fraud Waste and Abuse Prevention.

[4] *Id*.

that are not medically necessary, overcharging for services or supplies, and misusing billing codes to increase reimbursement.[5]

Parts of the ACA address Medicare and Medicaid, but not Title I.

What To Do

Refer the complainant to the HHS OIG Hotline if the complainant wishes to report fraud:

Call: 800-447-8477 (800-HHS-TIPS)
TTY: 800-377-4950
Online: https://oig.hhs.gov/fraud/report-fraud/
Mail: HHS Tips Hotline
P.O. Box 23489
Washington, DC 20026-3489

Retaliation: Complainants may need to consult their own counsel to help identify any possible federal protections, such as a retaliation complaint under the False Claims Act (see 31 U.S.C. § 3730(h)).

State laws also may vary. One place where complainants may start is the EEOC field office website. While the EEOC likely may not be able to take the complaint, this website has resources for other state agencies that handle discrimination complaints.
http://www.eeoc.gov/field-office

Finally, if the employer is a publicly traded hospital/facility, discuss with your supervisor and evaluate whether the complaint raises a potential SOX retaliation claim.

Discrimination in Health Care (Section 1557 of the Act)

Section 1557 of the Act applies civil rights protections (e.g. Title VI of the Civil Rights Act of 1964) to participation in health programs and activities receiving federal funds. This provision is part of Title I.

Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in any health program or activity that receives federal funding, including Medicare, Medicaid, and the ACA healthcare exchanges, and it applies to providers involved with those programs or activities, including hospitals and health insurance issuers.

Complaints of retaliation in employment for protected activity such as reporting a potential violation or refusing to participate in a violation of Section 1557 would be covered under Section 1558 of the Act. However, complaints of retaliation outside of

[5] *Id.*

employment (e.g. complaints by the patient that allegedly suffered the discrimination) would not be covered by Section 1558 and therefore should be treated as potential Section 1557 violations.

What To Do

Refer a complaint of a potential violation of Section 1557 to HHS's Office of Civil Rights, which is designated to receive complaints of discrimination under this provision. Online: http://www.hhs.gov/ocr/index.html

Retaliation: OSHA should docket and investigate a claim of retaliation in employment for engaging in protected activity related to Section 1557.