Twists And Turns For Texas' Health Care Employers

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Texans are a unique bunch. This goes beyond the loud, boisterous and larger than life caricature that comes to most people's minds. Not everyone wears boots and Stetsons. At least, not all the time.

Several employment-related laws in the Lone Star State are as unique as Texas. Take workers' compensation, for example. Texas is the only state that permits employers to opt out of worker's comp in favor of common law tort rules with respect to personal injury. Of course, there's a catch: if you opt out of worker's comp, you cannot use common law defenses such as contributory negligence or assumption of the risk. Nevertheless, a lot of Texas employers opt out of the workers' compensation system, either because their premiums are too high or they don't like the way their comp claims are administered.

Texas Medical Liability Act

The health care industry has its share of nonsubscribers, and here's where the uniqueness of Texas law makes another twist in the road. One of the products of the Texas tort reform movement is the Texas Medical Liability Act. It requires claimants to file an expert report by a certain stage of any lawsuit where there is an alleged "departure from accepted standards of medical care ... or safety or professional or administrative services directly related to health care."

Why is this important? It means a claimant must incur the additional expense of obtaining an expert opinion, which is intended to deter questionable claims.

Here's an example of how the TMLA affects a nonsubscriber case. In *Tillman v. Memorial Hermann Hosp. System*, the court held that an on-the-job back injury claim involved safety and alleged departure from accepted standards of medical care. As a result, the claim was dismissed when the employee failed to submit an expert report. The court also held a claim based on vicarious liability for a co-worker's negligence also requires a report.

Despite its broad scope in the injury context, TMLA does not apply with respect to pay disputes. Another example: In *Methodist Hospital v. Halat*, a doctor's resignation letter detailed the circumstances allegedly created by the employer that led him to resign. After the resignation, the hospital withheld some of the doctor's compensation. When he sued to recover this money, the hospital moved to dismiss the case when the doctor's attorney did not to file an expert report. Unlike

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Tillman, the Halat court ruled an expert report was not required under these circumstances, because the lawsuit was about unpaid compensation, not substandard care or safety.

At-Will Employment is Alive and Well, but ...

Under the employment-at-will doctrine, an employer can terminate an employee for good, bad or no cause at all. Texas was the fourth state to adopt employment at will when its Supreme Court issued the East Line & R.R.R. Co. v. Scott decision in 1888. Unlike many other states, Texas has adopted only one common law exception to its employment-at-will doctrine: termination for the sole cause of refusing to commit a criminal act.

There are two health care statutes that alter the strong presumption of at-will employment. Section 161.134 of the Texas Health & Safety Code prohibits retaliation against an employee of a hospital, mental health facility or treatment facility for reporting various violations of the law. Another part of the Code, Section 260A.014, prohibits retaliation against employees of assisted living facilities or related institutions who report, initiate or cooperate in any investigation or proceeding of a governmental entity relating to care, services or conditions at the facility. In short, these statutes protect health care whistleblowers.

What makes these statutes different from other retaliation statutes is the presumption of guilt built into them. They both provide for a rebuttable presumption of liability in the event adverse action is taken within 60 days of blowing the whistle.

How do you overcome a rebuttable presumption? Here are some ideas:

- explain the reason for adverse action in terms that are unrelated to whistleblowing (or any other inappropriate behavior); and
- demonstrate that others have suffered the same fate under similar circumstances that didn't include whistleblowing.

Nevertheless, temporal proximity between protected activity and adverse action has always been a powerful means for proving unlawful intent, and it will be up to the jury to determine whether the employer is to be believed.

Noncompete Agreements: Buying Your Way Out of a Jam

Covenants not to compete have not traditionally fared well in Texas courts, as they have been considered a restraint of trade. Since 1983, Section 15.50 of the Business & Commerce Code has governed noncompete agreements. Under the Code, the covenant must be ancillary to an otherwise enforceable agreement. This means the employer must have a justifiable purpose in subjecting its employee to a restrictive covenant prohibiting future completion. The statute is silent as to what constitutes a justifiable purpose. The Texas Supreme Court has held at least two reasons are

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constitutes a justifiable purpose. The Texas Supreme Court has held at least two reasons are justifiable: (1) protecting the employer's confidential information and (2) protecting the employer's goodwill.

The Texas noncompete statute requires that the restrictions must be reasonable as to geographical scope, temporal scope and the scope of activity to be restrained. These restraints may not be more burdensome than necessary to protect the employer's interests.

Again, physicians garner special treatment under Texas law. Four contractual provisions must be included in a physician's noncompete covenant — omission of any of these provisions make the covenant unenforceable.

First, the covenant must not deny the physician access to a list of his/her patients treated in the prior year. Second, the covenant must not prevent a physician from continuing to treat a patient during an acute illness. Third, the covenant must provide the departed physician with access to the medical records of any of his/her patients who provide written authorization and pay the fees for records imposed by the Texas Medical Board under the Texas Occupations Code.

The fourth requirement is unique among the 50 states: Physicians in Texas get an opportunity to buy their way out of a noncompete. The statute requires the buyout be at a predetermined "reasonable price" or at a price determined by an arbitrator. The arbitrator can be mutually agreed by the parties or one appointed by the court.

Using the arbitration option defers the decision of how much the buyout will cost and make it more likely the cost will bear a true relationship with the damage caused by the physician leaving his employer. However, there are a couple of disadvantages to relying on arbitration. First, arbitration can be a time-consuming process. Whether the parties agree in advance or have to go to court to have one appointed, discovery takes time, the hearing will take time and the arbitrator will need time to evaluate the evidence and determine the buyout's value.

The second disadvantage is a corollary to the first: Time is money. Attorneys handling these types of cases are working on an hourly basis, they will need to engage experts to determine appropriate valuations. The arbitrator is being paid on an hourly or per diem basis. In short, arbitration can be as expensive as a trial.

Uncertainty is the third disadvantage of utilizing arbitration. Not knowing "the price of freedom" can significantly affect the physician's analysis in determining a competing offer and whether he should stay or leave. For these reasons, having an agreed upon price or formula for determining the buyout price is the better practice, even if it does require some time and thought on the front end (i.e., when the relationship is being formed). Think of it as the physician's business prenuptial agreement. No one wants to talk about the cost of breaking up when you are in love. It's not going to happen to you. But it inevitably does, for any number of reasons.

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Conclusion

Texas has a reputation for being an employer-friendly state, and for good reason. For health care employers, it's a mixed bag: Some statutes make it easier for the employer, other statutes make it easier for the claimant, and still others create opportunities for both the employer and the employee. Make sure to consult with Texas labor and employment counsel before making employment decisions that can carry unintended consequences.

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