Litigation Forum:
Whistleblower
Developments 2018

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Statutory Framework
Sarbanes-Oxley Act of 2002 (SOX)


A covered employer may not terminate or otherwise discriminate against an employee for providing information that the employee reasonably believes constitutes a violation of federal laws relating to: (1) mail fraud, (2) wire fraud, (3) bank fraud, (4) securities/commodities fraud, (5) “any rule or regulation of the U.S. Securities and Exchange Commission” (SEC), or (6) “any provision of federal law relating to fraud against shareholders.”
SOX Anti-Retaliation Provision

**Covered Employers:**
- Publicly traded companies and their subsidiaries that are subject to the registration or reporting requirements of the Securities Exchange Act of 1934;
- Nationally recognized statistical ratings organizations;
- Private companies that serve as agents or contractors of publicly traded companies;
- Consolidated subsidiaries of publicly traded companies.
Prima Facie Case:
An employee must demonstrate by a preponderance of the evidence that:
1) he engaged in a protected activity;
2) the employer knew or should have known about the protected activity;
3) he suffered an adverse employment action; and
4) the circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the adverse action.
Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)


An employer may not take an adverse action against a whistleblower for:

1) Providing information to the Commission in accordance with the Dodd-Frank whistleblower incentive program;
2) Initiating, testifying in, or assisting in any investigation, judicial action, or administrative action of the SEC based on or related to such information, or
3) Making disclosures that are required or protected under SOX, the Securities and Exchange Act of 1934 (the Exchange Act), 18 U.S.C. §1513(e), or any other law, rule, or regulation subject to the jurisdiction of the Commission.
SEC Anti-Retaliation Provision

**Whistleblower Status:**
- The Exchange Act defines a “whistleblower” as “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” 15 U.S.C. § 78u-6(a)(6) (emphasis added).
- SEC regulations clarify that an individual is considered a whistleblower if (1) he possesses a reasonable belief (2) that he is providing information that relates to a possible securities law violation and (3) reports that information in a manner provided for under the Exchange Act. 17 C.F.R. § 240.21F-2(b)(1).

**Manner of Reporting:**
Until recently, courts were divided as to whether the SEC Anti-Retaliation Provision protects only individuals who report possible securities law violations externally to the SEC, or also individuals who report internally to supervisors or other persons with authority to investigate . . .
Holding:
Whistleblowers must report suspected misconduct to the SEC to be able to sue for retaliation under the SEC Anti-Retaliation Provision of the Dodd-Frank Act.
Digital Realty Trust, Inc. v. Somers: Implications

• Stronger incentive for whistleblowers to report directly to the SEC.
  • Reinforces the need for credible, robust internal reporting system.

• Companies will typically not know which internal whistleblowers are protected under Dodd Frank and which are not.
  • Internal whistleblowers need to be handled as carefully as ever.
**Prima Facie Case:**
To prevail on a claim under the SEC anti-retaliation provision, an employee must demonstrate that:

1) he engaged in protected activity;
2) he suffered an adverse employment action; and
3) the adverse employment action was causally connected to the protected activity.
SEC Announces Its Largest-Ever Whistleblower Awards

FOR IMMEDIATE RELEASE
2018-44

Washington D.C., March 19, 2018 — The Securities and Exchange Commission today announced its highest-ever Dodd-Frank whistleblower awards, with two whistleblowers sharing a nearly $50 million award and a third whistleblower receiving more than $33 million. The previous high was a $30 million award in 2014.
False Claims Act (FCA)

• The FCA prohibits any person from presenting a “false or fraudulent claim for payment or approval” to the United States. 31 U.S.C. § 3729(a)(1).

• It authorizes the federal government to seek reimbursement for false or fraudulent claims for payment, to punish wrongdoers through civil and criminal penalties, and to deter the future submission of false or fraudulent claims.

• Two primary means of enforcement:
  1) The U.S. Attorney General may file a civil action on behalf of the government;
  2) An individual citizen (a “relator”) may file a *qui tam* action on behalf of the government and assist the government in recovering funds that have been falsely obtained.
False Claims Act (FCA)


Employees, contractors, and agents may not be “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.”
**Prima Facie Case:**
To prove that an employer retaliated against an employee in violation of the FCA’s Anti-Retaliation Provision, an employee must demonstrate that:

1) he engaged in protected activity;
2) the employer knew of the protected activity; and
3) he was discriminated against because of his activity.
Ex-Justice Dept. lawyer offered to sell secret U.S. whistleblower lawsuits to targets of the complaints

The 41-year-old partner at Akin Gump Strauss Hauer & Feld in the District was caught wearing a wig and fake mustache trying to peddle a sealed federal lawsuit for $310,000 to a Silicon Valley technology company. “My life is over,” he told the undercover agent after his arrest at an intended cash drop at the Cupertino hotel.
SEC Enforcement & Confidentiality Agreements
SEC Rule 21F-17 (17 C.F.R. § 240.21F-17):

“No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement.”
Press Release

SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements

Agency Announces First Whistleblower Protection Case Involving Restrictive Language

“For immediate release
2015-54

“By requiring its employees and former employees to sign confidentiality agreements imposing pre-notification requirements before contacting the SEC, KBR potentially discouraged employees from reporting securities violations to us,” said Andrew J. Ceresney, Director of the SEC’s Division of Enforcement. “SEC rules prohibit employers from taking measures through confidentiality, employment, severance, or other type of agreements that may silence potential whistleblowers before they can reach out to the SEC. We will vigorously enforce this provision.”
Blowing the Whistle on the SEC’s Latest Power Move

The regulator would make employee confidence agreements a back door for access to trade secrets.

By Eugene Scalia
April 5, 2015 6:00 p.m. ET

S.E.C. Fires Warning Shot About Confidentiality Agreements

By BEN PROTESS  APRIL 1, 2015
In fiscal year 2017 alone, the SEC brought four actions based on language in severance agreements that the SEC alleged restricted employees’ ability to participate in government investigations.

The companies that were the targets of these enforcement actions settled for amounts ranging from $180,000 to $1.4 million.

- *In the Matter of HomeStreet, Inc. and Darrell Van Amen*, Exchange Act Rel. No. 79844, File No. 3-17801 (Jan. 19, 2017);
Policy Issues for Multi-National Companies

- Differences in legal regimes around the world can create challenges in the formulation of a global whistleblower policy:
  - Anonymous Reporting
  - Subject Matter
  - Works Councils / Labor Unions
  - Government Consultations
  - Data Protection
Wynn Macau Data Protection Case: A Warning to Multinationals

A recent case out of Macau demonstrates the tricky nature of internal investigations when conducted on an international scale.

By Sue Reisinger | March 20, 2018 at 05:04 PM

A court in Macau is pondering the amount in damages it should award a gaming executive who sued the Wynn Macau gambling resort for violating Macau’s data protection law by disclosing the executive’s personal information to its U.S. owners.

The court ruled on March 14 that Wynn Macau violated the law by sharing and internationally transferring the executive’s information during an internal investigation of an alleged bribe scheme. The internal probe was conducted by former FBI director Louis Freeh.
Best Practices for Investigations
Employer Considerations

**Compliance Strategies and Preventative Measures**

- Encouraging Internal Whistleblowing
  - Management Buy-In
  - Employee Assurance
  - Robust Investigations
- Effective Complaint Policies
- Education and Training
Employer Considerations

**Conducting Internal Investigations**
- Adopting procedures that limit discretion and ensure adequate oversight
- Promulgating escalation protocols
- Protecting privilege
- Maintaining confidentiality
- Avoiding retaliation (or the perception of retaliation)
- Managing public relations concerns
- Settlement
#MeToo
Investigations in the Wake of #MeToo

• Complaints receive serious, even Board level attention.
• Expectation that complainants will be kept informed.
• Hostility towards confidentiality agreements and arbitration provisions.
• Pressure to take aggressive action in response.
• Expectation that harassers will be punished in the public square.
Bio-Rad Appeals $11 Million Verdict for Ousted General Counsel

Former Bio-Rad GC Sanford Wadler won a whistleblower suit earlier this year against the company.

A Unique Whistleblower: When In-House Attorneys Blow the Whistle

Imagine this scenario: An in-house attorney discovers company conduct in the regular course of business that she believes violates her ethical responsibilities as an attorney.
• The views expressed in this deck are not necessarily attributable to any of the individual panelists or their respective employers.