

EMPLOYMENT LAW UPDATE

2014

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Corporate Compliance and Whistleblower Actions

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Growth Area

- EEOC retaliation charges jumped from 22,500 (29.8%) in FY 2006 to 38,500 (41.1%) in FY 2013
- Litigation of retaliation claims has increased in recent years (particularly since the Supreme Court's 2006 decision in *Burlington N. & Sante Fe Ry. Co. v. White*)
- Whistleblower cases under Sarbanes-Oxley (SOX) and Dodd-Frank continue to rise
- Huge incentives to whistleblowers under SOX and Dodd-Frank



Recent Developments – Whistleblower Cases

- SEC to award \$30-\$35 million to an anonymous tipster living outside of the U.S. who provided key original information for Dodd-Frank enforcement action
- \$614 million paid by JPMorgan Chase re non-compliant mortgage loans (2/14/14)
- \$200 million paid by U.S. Bank for non-compliant loans (6/14)
- SEC's first payment to whistleblower - \$50K to anonymous whistleblower for information on multi-million dollar fraud (09/21/12)



Recent Developments – Whistleblower Cases (cont.)

- OSHA ordered \$1.9 million award to former CFO of Clean Diesel Technologies for firing him after warning board of directors about financial concerns raised by proposed merger under SOX whistleblower provision (9/30/13)
- \$14 million by SEC to anonymous whistleblower for information leading to recovery of substantial investor funds (10/1/13)
- \$5 million paid by Tenet Healthcare to settle lawsuit re kickbacks to doctors for patient referrals (4/30/14)



Recent Developments – Whistleblower Rulings

- Supreme Court: SOX whistleblower protection applies to private contractors (*Lawson v. FMR*)
- DOJ will automatically review all new qui tam complaints filed under the False Claims Act (9/17/14)
- Fifth Circuit ruled internal disclosures are not protected by Dodd-Frank (*Asadi v. GE Energy, LLC*, 720 F.3d 620 (5th Cir. 2013)) but other courts disagree (*e.g.*, *Murray v. UBS Sec., LLC*, No. 12-civ-5914 (S.D.N.Y. May 21, 2013))



Recent Developments – Whistleblower Rulings (cont.)

- Dodd-Frank whistleblower protections do not apply outside the U.S., per NY court – *Liu v. Siemens AG*, No. 13-4385-cv (2d Cir. August 14, 2014)
- No right to jury trial under Dodd-Frank , per GA court– *Pruett v. BlueLinx Holdings, Inc.*, No. 1:13-cv-02607 (N.D.Ga. Nov. 12, 2013)
- Court rulings show self reports of fraud do not shield employer from suits by employees
- Court rulings show employers may be forced to disclose investigation documents in subsequent litigation



Problem 1 – Recognizing Retaliation and Whistleblower Situations



Sources of Protection – Employment Statutes

Federal Anti-Retaliation Provisions:

- Title VII of the Civil Rights Act
- 42 U.S.C. § 1981
- Americans with Disabilities Act (ADA)
- Age Discrimination in Employment Act (ADEA)
- Family and Medical Leave Act (FMLA)
- Fair Labor Standards Act (FLSA)
- Equal Pay Act
- National Labor Relations Act (NLRA)
- Affordable Care Act (ACA)



Sources of Protection – Safety Statutes

- Occupational Safety and Health Act (OSH Act)
- Federal Mine Safety and Health Act (Mine Act)
- Federal Railroad Safety Act (FRSA)



Employment Retaliation

Elements:

- Employee engaged in protected activity
- Employee suffered an adverse employment action
- Causation - “but-for” cause (under *Nasser*)

In absence of direct evidence of retaliation,
McDonnell Douglas burden-shifting analysis
applies.



Protected Activity

Under most employment anti-retaliation laws, protected activity includes:

- **Opposition** – opposing or complaining about any act or practice made unlawful under the statute (discrimination, harassment, etc.)
- **Participation** – filing a charge, testifying, cooperating, assisting or participating in an investigation, proceeding or hearing



Adverse Action

- Any act that is “materially adverse,” i.e., it would deter an objectively reasonable person from pursuing statutory rights (*Burlington Northern & Santa Fe Railway Co. v. White* (U.S. 2006))
- May include poor performance evaluation (particularly if it affects pay), reassignment, schedule change, or any disciplinary action
- But not minor annoyances or bad manners
- May go beyond the workplace



Pretext

- Adverse action closely followed protected activity
- Employee is treated differently (*e.g.*, given new job requirements or scrutinized more closely) following the protected activity
- Employer's stated explanation is false
- Employer violated internal policies or procedures
- Other employees who did not "blow the whistle" were treated differently



Employment Retaliation (cont'd)

Retaliation cases are difficult to defend:

- Often retaliation presents greater exposure than underlying claim of discrimination, harassment, etc.
- Retaliation claim can survive even when underlying claim fails
- Difficult causation issues – documentation, timing, etc.



Practical Steps to Minimize Retaliation

- Train supervisors – more than once
- Train employees
- Code of conduct
- Internal complaint reporting policy and procedure (multiple reporting channels)
- Prompt handling of complaints
- Thorough workplace investigations
- Document, document, document
- Communicate results, even in general terms?



Problem 2 – Whistleblowing Claims Under Corporate Anti-Fraud Statutes



Sources of Protection – Corporate Compliance Whistleblower Statutes

- **False Claims Act (FCA)**
- **Whistleblower Protection Act (for federal employees)**
- **Sarbanes-Oxley Act (SOX)**
- **Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)**
- **Foreign Corrupt Practices Act (FCPA)**



False Claims Act – Qui Tam suits

- False Claims Act allows a whistleblower with knowledge of past or present fraud on the federal government to sue on behalf of the government to recover civil penalties and triple damages
- Examples:
 - Medicare and Medicaid fraud
 - Defense contractor fraud
- Numerous states, including Colorado, have analogous false claims acts for state government-related fraud



False Claims Act – Qui Tam suits

- **Elements of FCA claim:**
 1. Submission of a claim for property or money is made to an agent of the federal government;
 2. The claim was false or fraudulent;
 3. The defendant/contractor knew that the claim or statement was false or fraudulent; and
 4. The falsity was material to the government's decision to pay the claim.



Recent Settlement of False Claims Act Case

- JP Morgan Chase agreed to settle a False Claims Act for \$614 million based on knowingly originating and underwriting non-compliant mortgage loans submitted for insurance coverage and guarantees by HUD, FHA and VA. (2/4/14)
- Case began when whistleblower Keith Edwards sued JP Morgan Chase in Jan. 2013 under the False Claims Act.
- Edwards' reward = \$64 Million



Sarbanes-Oxley Act

- Applies to publicly traded companies, their subsidiaries, and their affiliates
- Short statute of limitations – 90 days to file complaint
- Procedures:
 - Employee files complaint with OSHA
 - OSHA conducts detailed investigation
 - DOL makes initial determination
 - Either party files de novo appeal to ALJ within the DOL
 - Appeal to DOL Administrative Review Board, then Circuit Court
 - Employee may file suit in federal court if DOL does not complete process within 180 days



Sarbanes-Oxley Act

- Elements:
 - Employee engaged in protected activity
 - Employer knew about protected activity
 - Employee suffered unfavorable employment action
 - The protected activity was a “contributing factor” in the unfavorable action
- Defense: Employer must show by clear and convincing evidence that it would have taken the same action in the absence of the protected activity



Sarbanes-Oxley Act

- **Protected activity:**
 - Providing information, causing information to be provided, or assisting in an investigation concerning
 - Conduct the employee “reasonably believes” is a violation of mail, wire, bank or securities fraud statutes, SEC rules or regulations, or federal laws concerning shareholder fraud
 - When the information or assistance is provided to or the investigation is conducted by a federal agency, a member of Congress, or a person with supervisory authority over the employee
- **Generally does not include complaints about violations of internal policies**



Protected Activity

- Can be mistaken, but done in good faith
- Can be based on “reasonable concerns”
- Must be known by employer, but ...
- Need not use words like “this is discrimination,” “this is fraud,” or “this is illegal”



Sarbanes-Oxley Act

- Relief available:
 - “All relief necessary to make the employee whole”
 - Reinstatement is preferred remedy
 - Back pay with interest
 - Compensation for special damages, litigation costs, attorney fees, and expert fees
 - Unclear whether special damages includes emotional distress damages



Dodd-Frank Whistleblower Program

- Dodd-Frank amended the Securities Exchange Act, adding whistleblower incentives and protection.
- SEC can award eligible whistleblowers who voluntarily provide original information that leads to successful SEC enforcement actions resulting in monetary sanctions over \$1 million.
- Awards are 10-30% of the monetary sanctions collected
- Paid out of separate “Investor Protection Fund”



Dodd-Frank Whistleblower Program

- Final rules prohibit retaliation against whistleblowers who report possible wrongdoing based on a reasonable belief that a possible securities violation has or will occur.
- Rules provide incentives to report information internally before reporting to the SEC, but not required.
- FY2013 – SEC received 3,238 Whistleblower Tips potentially eligible for an award, involving:
 - Corporate Disclosures and Financials (17.2%)
 - Offering Fraud (17.1%) and
 - Manipulation (16.2%)



Foreign Corrupt Practices Act

- **Two Primary Components:**
 - **Anti-bribery provisions:** Prohibits most bribery and non-routine payments to foreign government officials;
 - **Financial record keeping and internal control provisions:** Requires specific records and financial internal controls to be maintained to provide reasonable assurance of accuracy of financial records and to demonstrate compliance.
- **Enforcement Authority shared between SEC and DOJ**

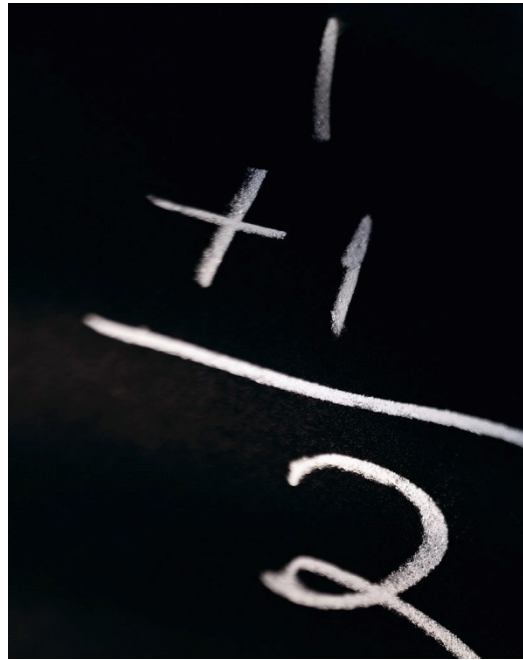


FCPA Elements

- A violation of the FCPA can be triggered by the following:
 - Anything of value – a gift, payment, offer, or promise to pay
 - Offered to a Foreign Official (broadly defined) – to any foreign government, political party official, candidate for political office, whether directly or through a third party.
 - To induce an action or failure to act by the Foreign Official
 - For any improper advantage – to secure any improper advantage or to obtain or retain business.



Problem 3 – Corporate Compliance System



Corporate Compliance

Growing out of the Federal Sentencing Guidelines, an effective ethics and compliance program must include 7 elements (plus one) (§ 8B2.1(a)(2)) :

- 1. High level company personnel who exercise effective oversight;
- 2. Written policies and procedures;
- 3. Training and education;
- 4. Lines of communication;
- 5. Standards enforced through well-publicized disciplinary guidelines;
- 6. Internal compliance monitoring;
- 7. Response to detected offenses and corrective action plans; and
- 8. Periodic “risk assessments” (added by amendment to the original seven Guideline elements) .

Adapt to your particular organization.



Practical Tips

- Establish ethical and compliance oriented culture
- High-ranking compliance officers – regular reports to the board
- Detailed written policies – bribery, corruption, accounting practices, etc.
- Annual risk assessments
- Update policies based on identified risks and enforcement trends
- Screening procedures for business partners, vendors, etc.



Practical Tips (cont'd.)

- Background checks on employees and important business partners
- Internal controls and checks on accounting procedures
- Train on ethics and compliance annually
- Regular monitoring to ensure compliance with policies and procedures
- Remediate problems quickly and appropriately
- Constant improvement



Thank You!

QUESTIONS?

