

# Litigation: Investigating whistleblower complaints

When whistleblowers raise issues, proceed with caution

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Companies launch internal investigations based on information that comes from a variety of sources, including newspaper articles, government requests for information and information bubbling up from within the organization that makes its way to the legal department. These issues can be spotted by the compliance department or raised in an internal audit. An internal investigation can also arise from information shared by employees, some of whom report issues of concern with no hint of adversity and others who raise issues as whistleblowers.

When issues are raised by individual employees who qualify as whistleblowers, companies should proceed carefully given the risk of corporate liability for retaliation. Equally important is the manner in which a company investigates the substance of whistleblower allegations. A properly handled investigation is critical not only for avoiding retaliation litigation—it can also often make the difference between aggressive criminal and regulatory enforcement action or an alternative resolution with the government.

In internal investigations arising out of whistleblower allegations, it is important to proceed deliberately and quickly in an effort to not fall behind any concurrent government investigation. A company should consider retaining outside or independent counsel, especially if the investigation is large in scope or is likely to result in the involvement of prosecutors or regulatory agencies. Some important first steps in any investigation include gathering documents and interviewing key individuals. The key is to conduct an internal investigation that is both credible and reliable to the various parties that may be interested in the results, such as government agencies, the company's board of directors, outside auditors and the like.

A major goal at the outset of internal investigations is to avoid taking action that can seem retaliatory and to avoid forming conclusions about the ultimate outcome. For example, in August 2012, the Wall Street Journal reported that NCR Corp. had launched an internal investigation into whistleblower allegations regarding potential violations of the Foreign Corrupt Practices Act in China, the Middle East and Africa. While the company hired an outside law firm to conduct an internal investigation, it continued to release press statements expressing "concerns about the veracity and accuracy of the allegations" as the investigation was ongoing. From a company's perspective, it is preferable to remain neutral until the investigation reveals more.

A company's independent and professional handling of an internal investigation can help protect it from retaliation litigation. In March, a judge dismissed a defamation claim brought by a whistleblower against Merck and its in-house counsel. After investigating the plaintiff's allegations of overbilling, the in-house counsel wrote a letter to the whistleblower, stating that his "allegations have been determined to be

unfounded and that the matter is now closed.” The whistleblower sued, stating that the characterization of his allegations as “unfounded” was defamatory. In dismissing the case, the judge commented that Merck’s in-house counsel handled the investigation and response “in a thoughtful and temperate manner.”

Sometimes the internal investigation reveals not only that a whistleblower’s allegations are unfounded, but also that the whistleblower’s conduct, either in relation to the complaint or otherwise, is problematic. Although there is always a risk of a retaliation suit, companies are able to make justified employment decisions when warranted.

In *Livingston v. Wyeth*, Mark Livingston, a training director at a vaccine facility, alleged that Wyeth had failed to comply with a Food and Drug Administration (FDA) consent decree. Wyeth’s internal investigation did not find any wrongdoing and the facility was ultimately certified as being in compliance with the FDA’s requirements. Shortly after the investigation, human resources reached out to Livingston regarding his inappropriate workplace behavior. Following an altercation with the director of human resources at a party, Livingston was terminated. He filed a retaliation suit, claiming that he was fired as a result of his earlier complaints. Wyeth argued that he was fired because of a long history of aggressive and disruptive misconduct. According to Wyeth, numerous employees had asked for transfers or resigned as a result of Livingston’s “abusive language and inappropriate behavior.” The court upheld the dismissal of Livingston’s suit, holding that his conduct was not protected under the Sarbanes Oxley Act. However, the court also went on to say that even if Livingston’s whistleblower activity was protected, Wyeth’s employment decision would have been justified by his continued misconduct.

In addition to the structural decisions made at the onset of an investigation, such as the retention of outside counsel and the mechanics of document collection, a company should plan for how to disseminate the results of an internal investigation within the organization. For example, if the investigation reveals whistleblower misconduct, should the results be shared with management, general counsel or the audit committee or some subset thereof? Similar considerations arise if the investigation touches directly or indirectly on the conduct of senior management. Depending on the individual circumstances of the company and its internal structure, each of these parties could have a different degree of responsibility and potential liability for making important employment decisions that arise out of the results of an investigation.

Internal investigations can be potentially fraught, costly and stressful for a company and its employees. However, as the Merck case illustrates, an internal investigation that is carried out thoughtfully and responsibly can have a successful resolution and help a company respond to the many potential consequences of whistleblower allegations. Careful planning and execution can yield an internal investigation with clear and reliable conclusions.

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