

Litigation: To the tune of \$3 billion, whistleblower claims are on the rise

The 2010 Dodd-Frank Act is the likely impetus for the steep increase

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At one time whistleblowers were relatively rare and isolated, and the law did not grant them much protection. But that's not the case anymore. Fulbright & Jaworski's recent litigation trends survey of in-house counsel found that more than 25 percent of companies had faced whistleblower allegations in the past three years.

Whistleblowers employed by defense contractors, pharmaceutical manufacturers and other companies have increasingly taken allegations of violations of law to the government—with striking results. Companies on the receiving end of these allegations have paid billions of dollars in fines and penalties following whistleblowers' cooperation with law enforcement authorities and civil lawsuits. What's more, new laws have granted whistleblowers enhanced protections against retaliation and increased financial incentives to tell the government about suspected violations of law by their employers.

In this article, the first of three on the evolving law and culture of whistleblowing, we discuss emerging trends and the basic legal and practical drivers of these trends. In the two articles that follow we discuss how companies can minimize the risk of being accused of “retaliating” against a whistleblower, and how companies can most effectively to conduct an investigation when faced with a whistleblower complaint.

Turning to the emerging trends, the present state of whistleblowing derives in large part from numerous federal laws that allow private parties, usually employees or other related individuals, to collect a portion of the government's settlement with or judgment against a company in exchange for information about the company's violations of the law. Companies frequently encounter these issues under the whistleblower provisions of the securities and tax laws, as well as the False Claims Act. Other laws on the state and federal level also protect and reward whistleblowers. The adoption and expansion of whistleblower provisions have led to nearly across-the-board increases in the number of cases filed in various arenas.

Statistics from the government show that not only is the number of suits increasing, but the total amount of the settlements resulting from whistleblower allegations is rising. The Department of Justice reported that in 2012 it recovered \$3.3 billion in settlements and judgments under the whistleblower provisions of just one federal statute—the False Claims Act. A total of 647 *new* suits were filed under this law alone in 2012. By way of comparison, only 207 new securities class actions were filed in the same time period.

The most talked about impetus for new whistleblower claims is the 2010 Dodd-Frank Act, which has led to the establishment of a whistleblower office within the enforcement division of the Securities and Exchange

Commission's (SEC). Under this Act, a whistleblower who provides original information to the government can receive a reward of 10 to 30 percent of the penalty resulting from a settlement or judgment in excess of \$1 million. In the first year of the program, the office received over 3,000 tips, complaints and referrals—about eight tips per day—and paid out one award of \$50,000.

The Internal Revenue Service's whistleblower program received significantly fewer complaints - 332 whistleblower submissions in fiscal year 2012 - but paid out a record \$125.4 million in awards. Though Bradley Birkenfeld, the whistleblower associated with the UBS foreign bank account investigation, received the bulk of the payouts (\$104 million), the remaining \$21.4 million nevertheless exceeded the \$8 million paid to whistleblowers in the previous year. The IRS program also amended its provisions to raise the whistleblower award to 15% to 30% of the tax revenue recovered.

Whistleblowers have also collected substantial sums as a result of the government's recoveries in False Claims Act cases. In March 2012, for example, whistleblowers received nearly 20 percent, or \$4.6 million, of a \$25 million settlement paid by Odyssey HealthCare.

Many observers, especially business advocates, worry that these programs discourage employees from raising important issues with internal compliance officials in order to secure large payouts. Former Representative Michael Oxley, who drafted the Sarbanes-Oxley Act of 2002, recently spoke out against the Dodd-Frank law's expansion of whistleblower incentives, saying that such incentives encourage employees to seek a "lottery" payout. Sarbanes-Oxley viewed whistleblower protections as a means of encouraging internal reporting and promoting robust internal corporate compliance efforts. Dodd-Frank, in contrast, seeks to incentivize whistleblowers to bypass internal compliance efforts.

In the health care industry, whistleblowers are now routinely bringing lawsuits, *qui tam* cases, rather than air their concerns with internal compliance officials. Whistleblowing has come so far in this field that often the whistleblowers are not lower level employees but rather managers or individuals with oversight responsibilities, including compliance officers. In January 2012, for example, the DenverHealthMedicalCenter paid \$6.3 million to settle a whistleblower case brought by its former internal auditor.

The increase in the number of suits and size of awards associated with whistleblower cases, combined with the government's stated efforts to devote more resources and time to investigating whistleblower complaints, makes this a pressing issue for many industries. Even a whistleblower claim not accompanied by a regulatory or criminal investigation will frequently result in a costly internal investigation which must be handled appropriately. In our next articles we will discuss how reduce a company's risks when they encounter whistleblowers who remain employees – both the risk of being accused of retaliating against them, and the risks associated with investigating the claims made by whistleblowers.

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