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Litigation: Whistleblower retaliation claims

Two trends in whistleblower activity have created new hazards for companies

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The laws protecting and rewarding corporate whistleblowers have increased in scope and number in recent years, as we described in our most recent article. Even more dramatically, courts and lawmakers have broadened the definition of protected whistleblower activity—that is, the type of conduct that triggers legal protection against retaliation. These two trends taken together have broadened the universe of potential whistleblowers and heightened the risk of corporate liability for claimed retaliation.

In March 2013, the U.S. Court of Appeals for the 3rd Circuit handed down the most expansive definition of protected whistleblower activity to date, ruling in *Wiest v. Lynch* that an employee who expresses "reasonable belief" of an accounting irregularity is a whistleblower under the securities laws, even if his statement lacks any clear connection between the accounting error and shareholder fraud.

In *Wiest*, an employee raised concerns with management about the treatment of lavish corporate events as business expenses. Although the complaint did not allege a connection between this accounting irregularity and one of the types of fraud covered by the Sarbanes Oxley Act, the court found that this was "protected activity" under the Act and that his subsequent firing was in retaliation for that activity. The court reasoned that his complaint put the company on notice of a potentially fraudulent tax deduction, which in turn could have resulted in finding a possible violation of law "relating to fraud against shareholders." The ruling was in stark contrast to the prior standard, which required whistleblowers to make allegations that "definitively and specifically" constituted one of the types of fraud covered by the Act.

This striking expansion of protected activity is not limited to the securities context. In February, the Department of Labor issued an interim final rule for the purposes of complying with the Affordable Care Act's whistleblower protection provisions. Under the new rule, protected whistleblower activity includes any complaint made on the basis of a "subjective good faith and an objectively reasonable belief" that a violation of the Act took place, including a complaint made verbally and not in English.

These developments mean that in addition to dealing with the substance of whistleblower allegations, employers must also deal with potential retaliation liability. A variety of laws create civil and criminal penalties for employers who retaliate against whistleblowers. For example, the Sarbanes-Oxley Act and Dodd Frank Act include civil causes of action for retaliation, as well as criminal penalties. The False Claims Act and the Occupational Safety and Health Act have separate anti-retaliation provisions which have drawn renewed interest with the government's recent focus on health care regulation and compliance.

States as well have whistleblower protection statutes, and employers can also find themselves subject to common law wrongful termination suits. These suits can create millions of dollars of liability for companies. A retaliation action under the Dodd-Frank Act or the Affordable Care Act allows for reinstatement and recovery of double back pay and costs and attorneys' fees. Other statutes even allow for recovery of punitive damages—a former employee of Shaw Environment & Infrastructure recently recovered $3.4 million in a False Claims Act retaliation claim brought in federal court in Alaska including $2.5 million in punitive damages.

What is "retaliation"? Generally, an employee bringing a whistleblower retaliation suit must show that 1) he or she engaged in a protected activity under a particular statute, 2) the employer took some adverse employment action against the employee and 3) the adverse action was causally related to the protected activity. An "adverse employment action" goes beyond termination—in the context of employment discrimination, generally considered applicable to the whistleblower context, the Supreme Court has said that changing an employee's schedule or even excluding the employee from an important business meeting or activity could potentially constitute retaliation. The 2012 Whistleblower Protection Enhancement Act, which protects federal agency whistleblowers, includes in its definition of prohibited retaliation an agency's reassignment, adverse pay decisions or a significant change in duties, responsibilities or working conditions.

In light of these developments, companies should understand the risks of the steady expansion of whistleblower law and protected activity. While these provisions once applied to concrete allegations of specific violations of law, they now include much more, including complaints made upon "reasonable belief" that ultimately turn out to be unsubstantiated. Retaliation liability should thus be considered on top of the risks associated with the substance of whistleblower allegations, and companies should take care to develop robust anti-retaliation policies that take into account the growing scope of activity considered to be whistleblowing law.

In the last of our three articles on whistleblowing, we will discuss how to handle the substance of a whistleblower's complaint and the conduct of internal investigations that arise from such a complaint.

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