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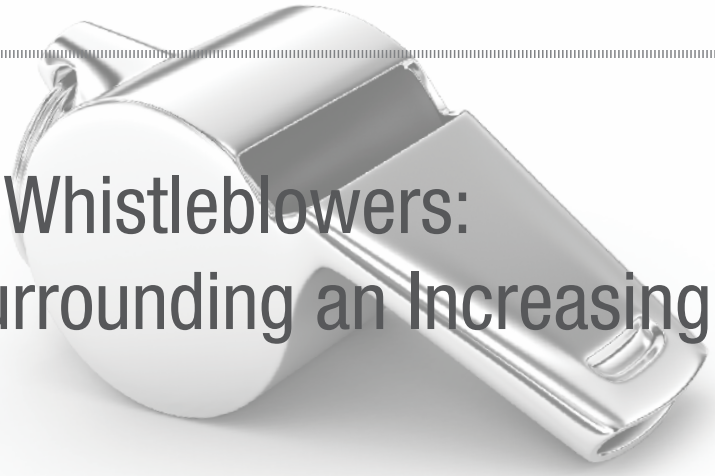
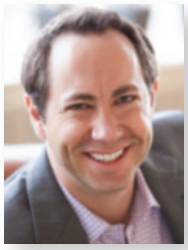


In-House Counsel as Whistleblowers: The Thorny Issues Surrounding an Increasingly Common Event

In the past two decades, the size of in-house legal departments has increased dramatically. Consequently, it should be no surprise that in the same period of time the prevalence of whistleblower claims by in-house counsel has increased as well. This article addresses the most common grounds for whistleblower claims by in-house attorneys, as well as two thorny issues that arise when an attorney turns whistleblower.



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Common Federal Whistleblower Claims

Retaliation Under the Sarbanes-Oxley Act (SOX)

Section 806 of SOX prohibits a publicly traded company, or any contractor or agent of such company, from retaliating against an employee who blows-the-whistle on what she reasonably believes to be a violation of statutes regarding mail fraud, wire fraud, bank fraud or securities fraud; any rule or regulation of the Securities and Exchange Commission (SEC); or any provision of Federal law relating to fraud against shareholders. *See* 15 U.S.C. §1514A(a)(1). Section 307 of SOX instructed the SEC to issue rules regarding the "standards of professional conduct for attorneys" and specifically mandated that such rules "requir[e] an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof" to the company's general counsel or CEO, or if those persons fail to respond appropriately, to the audit committee of the board of directors. *See* 15 U.S.C. §7245. The SEC carried out this mandate by issuing the "Standards of Professional Conduct for Attorneys,"17 C.F.R. Part 205, which require attorneys to report material violations "up the ladder" until the attorney receives an "appropriate response." *See* 17 C.F.R. §205.3(b).

Generally, "attorneys who undertake actions required by SOX Section 307 are to be protected from employer retaliation under the whistleblower provisions of SOX Section 806." *Jordan v. Sprint-Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 16 (ARB Sept. 30, 2009). Courts have routinely found that in-house counsel may be protected under Section 806 if they engage in other types of protected activity. *See*, e.g., *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996 (9th Cir. 2009) ("Nothing in this section indicates that in-house attorneys are not also protected from retaliation …").

Retaliation and Bounties Under the Dodd-Frank Act

The Dodd-Frank Act prohibits employers from retaliating against whistleblowers who, *inter alia*, "mak[e] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*)…." *See* 15 U.S.C. 78u-6(h)(1)(A)(iii). This language incorporates Section 307 of SOX and Part 205 of the rules implementing this provision, and thus, any in-house attorney who made a disclosure of a "material violation" under Part 205 would be protected from retaliation under Dodd-Frank as well as SOX.

In addition to Dodd-Frank's anti-retaliation provision, the Act also created a bounty program under which a whistleblower providing "original information" relating to a violation of securities laws which leads to the recovery of monetary sanctions of more than $1 million is entitled to a bounty of between 10 and 30 percent of the recovery. *See* 15 U.S.C. 78u-6.

Attorneys may not be able to recover a whistleblower bounty under Dodd-Frank because the SEC's rules preclude an award if the information disclosed was (a) obtained through a communication subject to the attorney-client privilege, (b) obtained in connection with legal representation, or (c) made by an employee in or based on information derived from an entity's legal, compliance or auditing departments.

See 17 C.F.R. § 240.21F-4(b)(4)(i)-(iii). However, exceptions to these exclusions allow a bounty if the disclosure was made in order to remedy or stop a material violation that could injure the company or its investors, or in some circumstances if the company's officers and board have failed to act on the information for over 120 days. *See* 17 C.F.R. § 240.21F-4(b)(4)(v).

Retaliation and *Qui Tam* Awards Under the False Claims Act

The False Claim Act (FCA) imposes liability on any person who receives federal funds as the result of a fraudulent or false claim for payment, or who avoids paying the federal government funds through a fraudulent or false representation. *See* 31 U.S.C. § 3729(a). The Act contains a *Qui Tam* provision that allows private persons, known as "Relators," to prosecute violations on behalf of the federal government. See 31 U.S.C. § 3730(b). The Act provides that such Relators will receive an award equal to 15 to 30 percent of the damages and fines recovered in any *Qui Tam* action. *See id.* at (d).

The FCA also contains an anti-retaliation provision that bars any person from retaliating against a whistleblower who engages in acts in preparation to file a *Qui Tam* claim, files a *Qui Tam* claim, or attempts to stop one or more violations of the FCA's liability provisions. *See* 31 U.S.C. § 3730(h).

Generally, an in-house attorney may be a Relator in a *Qui Tam* action against their employer only if the ethical rules applicable to that attorney would permit the disclosure of the client's confidential information in such circumstances. *See U.S. ex rel. Doe v. X Corp.*, 862 F. Supp. 1502, 1508 (E.D. Va. 1994); *U.S. v. Quest Diagnostics Inc.*, 734 F.3d 154 (2d Cir. 2013).

However, a whistleblower is protected from retaliation under the FCA even if they could not otherwise bring a *Qui Tam* claim, so long as they engaged in efforts to stop a violation of the FCA. Consequently, even if an in-house attorney were barred from becoming a Relator in a *Qui Tam* action, her efforts to stop the violations of the FCA are likely protected activity under the Act.

Unique Issues Regarding In-House Attorney Whistleblowers

Use of Protected and Privileged Information

One of the most unique issues in any attorney whistleblower case is the extent to which, or whether, the whistleblower will be able to use the client's confidential information to prove her claims. The American Bar Association (ABA) has weighed in on this issue in an ethics opinion discussing Rule 1.6(b)(2) of the Model Rules of Professional Conduct[1], which concluded that

> [t]he Model Rules do not prevent an in-house lawyer from pursuing a suit for retaliatory discharge when a lawyer was discharged for complying with her ethical obligations. An in-house lawyer pursuing a wrongful discharge claim must comply with her duty of confidentiality to her former client and may reveal information to the extent necessary to establish her claim against her employer.

ABA Formal Ethics Opinion 01-424 at 5 (Sep. 22, 2001).

Model Rule 1.6(b)(2) and similar state rules have led a "modern trend" towards a more liberal view of allowing retaliatory discharge claims by in-house attorneys, even when such claims require the attorney to use client confidences to prove the claim. *See, e.g., Willy v. ARB*, 423 F.3d 483 (5th Cir. 2005).

However, courts in several states that have not adopted the Model Rules often hold that there are no (or very limited) circumstances in which an in-house attorney may use her employer's confidences to prove a whistleblower claim. *See, e.g., General Dynamics Corp. v. Superior Ct. of San Bernardino*, 876 P.2d 487 (Cal. 1994).

Retention of Documents

Another thorny issue in attorney whistleblower cases is whether the whistleblower can use the documents she collected from her prior employer to prove her claims.

Generally, courts engage in a balancing test to determine whether a whistleblower's acquisition, retention and dissemination of documents were protected activity. *See Jefferies v. Harris County Cnty Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980). Several courts have applied the multi-factor test laid out in *Niswander v. Cincinnati Insurance Co.*, which requires consideration of

(1) how the documents were obtained,
(2) to whom the documents were produced,
(3) the content of the documents, both in terms of the need to keep the information confidential and its relevance to the employee's claim of unlawful conduct,
(4) why the documents were produced, including whether the production was in direct response to a discovery request,
(5) the scope of the employer's privacy policy, and
(6) the ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy.

Niswander v. Cincinnati Insurance Co., 529 F.3d 714, 726 (6th Cir. 2008).

However, under both the False Claims Act and the Dodd-Frank Act, the mere act of collecting and retaining documents can itself be protected activity. Under the FCA, retention of documents has been held to be protected activity under the Act's anti-retaliation provision, 31 U.S.C. § 3730(h). *See U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 740 (D.C. Cir. 1998). Similarly, Dodd-Frank and its regulations appear to provide protection for individuals who collect incriminating documents and provide those documents to the SEC to support a whistleblower claim. *See* 17 C.F.R. § 240.21f-4(b)(1).

Conclusion

In-house attorneys are uniquely able to identify and expose perceived wrongful conduct by their employers. The questions then become whether the whistleblowing attorney has protection from retaliation and whether she can even use her knowledge to blow the whistle. Given the prevalence of whistleblower statutes and the increasing size of in-house legal departments, we will likely continue to see these difficult and unique issues arise. P

1 Since the release of its Ethics Opinion, the ABA re-numbered Model Rule 1.6(b)(2), as originally set forth in 1983, and it is now Model Rule 1.6(b)(5). *See* Model Rules of Prof'l Conduct R. 1.6(b)(5) (2003).