Effectively Dealing with Whistleblowers in Internal Investigations and Related Proceedings

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“Whistleblowers point out fraud, waste, and abuse when no one else will, and while they do so while risking their professional careers, they are often treated like skunks at a picnic.”

- Senator Charles E. Grassley (R-Iowa), January 31, 2012

I. INTRODUCTION

During the last several years, federal and state governments have become increasingly more reliant on whistleblowers to expose waste, fraud, and abuse. Whether under the False Claims Act, the Internal Revenue Service’s whistleblower statute, or the Dodd-Frank Whistleblower Program, whistleblowers are provided with a myriad of ways to report misconduct to the government. Along with incentivizing whistleblowers to bring such conduct to light through considerable financial rewards, whistleblower laws typically include specific provisions that broadly prohibit retaliation, discrimination, or other adverse action against employees who engage in whistleblowing activity.

These anti-retaliation laws can pose numerous challenges to companies once allegations of wrongful conduct are reported internally within the company or externally to government regulators. And, dealing effectively with a whistleblowing employee can be the difference between heading off a governmental inquiry before it begins or minimizing the consequences that flow from such an inquiry, and enduring a protracted government investigation with considerable risk of fines, penalties, exclusion from federal contracting or programs, or worse. A failure to deal effectively with a whistleblower also can expose a company to the risk of claims
for retaliation, compromise a company’s efforts to address compliance issues raised by the whistleblower, or increase the risk of liability under one of many anti-fraud laws.

While many whistleblower statutes have been on the books for a number of years, there is no denying the recent increase in their use. In FY 2012, the U.S. Department of Justice reported that 647 new actions were filed under the False Claims Act by whistleblowers and whistleblowers recovered more than $439 million in share awards under the Act.1 The U.S. Securities and Exchange Commission (“SEC”) reported that, in FY 2012, the SEC received more than 3,000 tips, complaints, and referrals under the Dodd-Frank Whistleblower Program, and a whistleblower fund of over $452 million is in place to award whistleblowers who expose financial fraud.2 These record setting whistleblowing statistics show no sign of reversing course. For this reason, companies should proactively consider practical solutions for dealing with whistleblowers and investigating the concerns they raise.

II. HOW ARE WHISTLEBLOWERS PROTECTED?

The False Claims Act and the federal securities laws contain two of the most widely known whistleblower statutory frameworks. Under the False Claims Act, 31 U.S.C. §§ 3729 et seq., a whistleblower (referred to as a “qui tam relator”) is permitted to file an action on behalf of the United States asserting that an individual or entity has knowingly presented or caused to be presented a false claim for payment to the federal government or has knowingly and improperly avoided or decreased an obligation to pay money owed to the federal government.


31 U.S.C. §§ 3729(a)(1)(A), 3729(a)(1)(G) & 3730(b). For such false claims, the government may recover treble damages and a per claim penalty of between $5,500 and $11,000 for each false claim at issue. *Id.* § 3729(a)(1). If the *qui tam* relator or the government prevails under the False Claims Act, either by verdict or settlement, the *qui tam* relator who filed suit may be entitled to receive up to thirty percent (30%) of the proceeds of the action or settlement. *Id.* § 3730(d).

The False Claims Act also protects *qui tam* relators who pursue whistleblowing activity under the Act. The False Claims Act prohibits retaliation against “[a]ny employee, contractor, or agent” if that individual is “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent . . . in furtherance of other efforts to stop [one] or more violations” of the False Claims Act. *Id.* § 3730(h). Relief under the False Claims Act for a violation of this provision would entitle a whistleblower to reinstatement with the same seniority but-for the discrimination, two times the amount of back pay with interest, and compensation for any special damages sustained as a result of the discrimination, including costs and attorney’s fees. While courts typically have required a whistleblower to establish that the adverse employment action was motivated at least “in part” by the employee’s engagement in protected activity, it is possible that courts will begin to require whistleblowers to establish that the adverse employment action would not have been taken “but-for” the employee’s protected activity in light of recent U.S. Supreme Court case law.³

Relying on public policy grounds, courts generally have found that *qui tam* relators are exempt from limitations imposed by confidentiality agreements into which they enter with their employers. Moreover, a significant number of courts have refused to enforce waivers or releases of claims in separation or termination agreements when employers have sought to enforce such provisions as a defense to actions brought by *qui tam* relators under the False Claims Act.

Under the Dodd-Frank Whistleblower Program, whistleblowers who bring forward information that leads to an SEC enforcement action concerning a violation of the federal securities laws in which sanctions exceeding $1 million are recovered are eligible for awards of between 10% and 30% of the money collected. 15 U.S.C. § 78u-6(b). Whistleblowers who report possible violations of the federal securities laws are protected from discharge, demotion, suspension, being threatened or harassed, or otherwise discriminated against for providing information to the SEC, testifying or assisting in an SEC investigation or enforcement action, or making disclosures required by the federal securities laws. *Id.* at § 78u-6(h)(1)(A).

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4 See United States ex rel. Cafasso, v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1061-62 (9th Cir. 2011). Such an exemption has been determined to be necessary given that the False Claims Act requires that a *qui tam* relator turn over all material evidence and information to the government when bringing a *qui tam* action. *See* 31 U.S.C. § 3730(b)(2)

5 See U.S. ex rel. Ritchie v. Lockheed Martin Corp., 558 F.3d 1161 (10th Cir. 2009) (discussing case law and concluding that employee releases of *qui tam* claims should only be enforced when the fraud was disclosed to the government prior to execution of the release); see also U.S. ex rel. Radcliffe v. Purdue Pharma, Inc., 600 F.3d 319 (4th Cir. 2010) (“When the government is unaware of potential FCA claims the public interest favoring the use of *qui tam* suits to supplement federal enforcement weighs against enforcing prefiling releases. But when the government is aware of the claims, prior to suit having been filed, public policies supporting the private settlement of suits heavily favor enforcement of a prefiling release.”).

6 The SEC’s Dodd-Frank Whistleblower Program went into effect on July 21, 2010, when Dodd-Frank Wall Street Report and Consumer Protection Act was signed into law. The same law also established a whistleblower incentive program at the Commodity Futures Trading Commission that rewards individuals who submit tips related to violations of the Commodity Exchange Act.
Whistleblowers subjected to prohibited retaliation or discrimination are eligible for reinstatement, two times back pay with interest, litigation costs, and attorney’s fees. Id. at § 78u-6(h)(1)(C).

An employee who reports compliance concerns only internally may still be protected from retaliation or discrimination under the federal securities laws. Moreover, the SEC discourages companies from seeking to have employees waive or otherwise limit their anti-retaliation rights. The SEC also has indicated that the very attempt to secure a waiver or limitation might be considered by a court as supporting a retaliation claim. Furthermore, SEC rules provide that no person may take any action to impede a whistleblower from communicating with the SEC about a possible violation of the federal securities laws, including by enforcing or threatening to enforce a confidentiality agreement.

### III. PRACTICAL STEPS FOR DEALING WITH WHISTLEBLOWERS

There are many practical steps a company can take to deal effectively with whistleblowers. Many of these steps flow from the legal requirements imposed on companies because they are publicly traded or operate within an industry that dictates or strongly encourages compliance programs with robust procedures for dealing with whistleblower complaints. Other considerations, however, will inform how a company responds to the

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8 Id.
9 See SEC Rule 21F-17(a).
10 For example, the Patient Protection and Affordable Care Act (“PPACA”) requires a compliance program as a condition of participation in federal healthcare programs. Patient Protection and Affordable Care Act; Pub. L. 111-148 Section 1128 J (d); (March 23, 2010), and the Healthcare and Education Reconciliation Act of 2010, Pub. L. 111-152 (March 30, 2010). See PPACA, Subtitle E, Medicare, Medicaid and CHIP Program Integrity Provisions, Section 6401, www.dol.gov/ebsa/healthreform. Likewise, Sarbanes-Oxley requires all public companies
whistleblower’s complaints, including any investigation and remedial actions undertaken with respect to those complaints.

A. Establish an Effective Compliance Program

The most obvious step a company can take as a means of dealing with whistleblowers is a proactive one: design and implement an effective compliance program. In addition to satisfying any legal obligations that may require a company to have a compliance program in place, there are numerous benefits that otherwise flow from an effective compliance program. From the perspective of government regulators, compliance programs can reduce the risk of violating applicable laws, rules and regulations and may allow organizations to benefit from deferred prosecution, reduced fines, and sentences, and minimize the impact of other civil, criminal and administrative enforcement efforts. Compliance programs also help create a culture of compliance and lessen the likelihood of retaliation against whistleblowers by individuals within a company.

Effective compliance programs may take many forms depending upon the particular organization and there is not a “one-size-fits-all model.” For example, for healthcare providers, the U.S. Department of Health and Human Services/Office of Inspector General has developed a series of voluntary compliance guidance documents directed at various segments of the healthcare industry.11 That guidance encourages the development and use of internal controls to monitor adherence to applicable statutes, regulations, and federal healthcare program

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requirements and characterizes the adoption and implementation of compliance programs as a key to significantly advancing the prevention of waste, fraud, and abuse.

Effective compliance programs often will include the implementation of written policies, procedures and standards of conduct, the designation of a compliance officer and compliance committee, training and education, and effective lines of communication. While compliance programs may cover a broad range of statutes, regulations, and activities, a critical component of such programs necessarily includes outlining how complaints from employees should be handled.\textsuperscript{12} This typically will involve, among other things, the maintenance of a process, such as a hotline, to receive complaints, and procedures to protect the anonymity of whistleblowers and to protect whistleblowers from retaliation. Compliance programs also must include the development of a system to respond to allegations of improper or illegal activities.

\textbf{B. Promote a Culture that Encourages Compliance and Reporting of Complaints}

To enhance the effectiveness of a complaint reporting system and to reduce the likelihood of retaliation claims, organizations should promote a culture that encourages compliance and stresses the importance of reporting complaints. The encouragement of such a culture often times will require training of supervisors, managers, and others within the organization charged with responding to complaints to ensure that complaints are not met with skepticism, resentment, or hostility. Establishing and maintaining a culture of compliance will encourage employees to raise concerns informally within the company’s management structure and potentially will lessen

\textsuperscript{12} As contemplated by the United States Sentencing Guidelines, effective compliance programs are generally considered to have at least seven components: (1) standards and procedures; (2) oversight; (3) education and training; (4) auditing and monitoring; (5) reporting; (6) enforcement and discipline; and (7) response and prevention. \textit{See} United States Sentencing Commission Guidelines, \textit{Guidelines Manual}, 8A1.2, comment (n.3(k)); \textit{see also} 63 Fed. Reg. 8,987, Publication of the OIG Compliance Guidance for Hospitals.
an employee’s perceived need to resort to external whistleblowing. Though it will not be possible in all circumstances, it is important for companies to consider providing feedback to employees who raise compliance concerns (where appropriate) and stress the company’s receptiveness to receiving such complaints from employees.

The company should make use of audits and/or other evaluation techniques to monitor the effectiveness of its compliance program and to address any shortcomings revealed in such an audit. The company also should take appropriate measures to ensure that there is no retaliation with respect to employees raising compliance issues. This may require detailed recordkeeping surrounding an employee who raises compliance issues to document that the company has treated the employee fairly and has not retaliated or otherwise discriminated against the employee in any employment decisions made concerning that employee.

C. Properly and Effectively Investigate Complaints

Once a company becomes aware that a whistleblower has raised a compliance concern, the company must take steps to appropriately evaluate whether and how the concerns should be investigated. Credible allegations of misconduct generally will trigger the need for an internal investigation of those allegations, but it is often challenging for a company to determine exactly how such an investigation should be structured and how the company should define the scope of the investigation.

At the outset, the company must evaluate who should conduct the internal investigation. Depending on the nature of the issue being investigated, it may be entirely appropriate for the company’s human resources department, in-counsel’s office, or compliance department to conduct the investigation. In other instances, however, a company may need to turn to outside counsel (and perhaps independent outside counsel) to conduct the investigation. This evaluation
will often be dictated by the seriousness of the allegations, the need for independence, whether the company has the resources to conduct an effective investigation internally, whether there is a need for specialized expertise, and whether there is a likelihood of government involvement with respect to the investigation. The need for confidentiality and/or reliance on any applicable privileges or protections from disclosure may also inform the decision regarding whether to engage outside counsel to conduct the investigation.

In conducting the investigation, the company and its advisors must determine the goal and scope of the investigation and formulate a plan for the investigation. This likely will involve review of documents and interviews of witnesses and the whistleblower, if that person is known. Witness interviews typically should be conducted with at least two interviewers present and after providing witnesses with appropriate “Upjohn warnings.”

The company will also need to determine the scope of information provided to employees regarding the investigation. In making that determination, the company typically will balance the need for cooperation of employees in connection with interviews and the preservation of evidence with limiting the number of individuals who know about the investigation to help protect the confidentiality of the investigation and reduce the likelihood of retaliation.

IV. LIMITS ON THE CONDUCT OF WHISTLEBLOWERS

Not all conduct by whistleblowers is considered protected activity. For instance, the mere fact that a company conducts an investigation into matters raised by a whistleblower that

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13 See Upjohn Co. v. United States, 449 U.S. 383 (1981); see also United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009). “Upjohn warnings” typically involve counsel conducting the investigation apprising a witness: (1) the client which the attorney represents (i.e., the company, audit committee or special litigation committee); (2) that the attorney does not represent the witness; (3) that the conversations with the witness are confidential and privileged; (4) that the witness should maintain confidentiality with respect to what is discussed; (5) that the privilege belongs to the client and not the witness; and (6) that the client may decide to waive the privilege and disclose the facts learned during the investigation to third parties, including the government.
involves interaction with the whistleblower is not considered to be retaliatory. And, a whistleblower likely can be disciplined for refusing to cooperate with an internal investigation or hindering that investigation, such as by refusing to be interviewed, without that discipline being considered retaliatory.\footnote{See, e.g.,\textit{Caldwell v. EG&G Defense Materials, Inc.}, ARB No. 05-101 (Oct. 31, 2008); see also\textit{Merkel v. Scoville, Inc.}, 787 F.2d 174, 179-80 (6th Cir. 1986);\textit{Morris v. Boston Edison Co.}, 942 F. Supp. 65, 71 (D. Mass. 1996) (rejecting Title VII retaliation claim of a supervisor who was discharged for contravening orders prohibiting him from discussing the company’s internal investigation with the employee who had made the harassment complaints, because the supervisor merely alleged he participated in an internal company investigation, which was not protected activity);\textit{Tuthill v. Consolidated Rail Corp.}, 1997 WL 560603 (E.D. Pa. Aug. 26, 1997) (“Title VII’s definition of ‘protected activity’ does not include participation in an internal investigation”).} Moreover, courts have limited \textit{qui tam} relators’ ability to bring actions under the False Claims Act based on information protected by the attorney-client privilege.\footnote{See \textit{U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.}, 2013 U.S. Dist. LEXIS 74833 (C.D. Cal. May 20, 2013) (disqualifying relator’s counsel resulting from impermissible use of privileged materials in pleadings); \textit{U.S. ex rel. Frazier v. IASIS Healthcare Corp.}, 2012 U.S. Dist. LEXIS 6896 (D. Ariz. Jan. 10, 2012) (explaining in \textit{qui tam} case that relator’s counsel “did breach an ethical duty to seek a ruling from the Court about the privileged documents and breached their duty to contact [the defendant] about the documents after the complaint was unsealed”); \textit{U.S. ex rel. Fair Lab. Practices Assoc. v. Quest Diagnostics, Inc.}, 2011 U.S. Dist. LEXIS 37014 (S.D.N.Y. Apr. 5, 2011) (finding that former in-house counsel could not serve as relator against former client and disqualifying \textit{qui tam} counsel).} Generally speaking, however, as long as whistleblowers are not disclosing privileged information outside the company or otherwise violating the law, the protections afforded whistleblowers are extensive and companies should take great care in avoiding retaliation or discrimination against those individuals.