Representing Executive-Level Whistleblowers

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I. Introduction

Nearly all employees who face retaliation after blowing the whistle on unlawful conduct in the workplace also face a myriad of challenges in bringing legal claims against their employers. There are, however, certain issues that are unique to executive-level whistleblowers that require particular attention by both client and counsel. In contrast to a line worker at a manufacturing plant, for example, who has personal knowledge about specific conditions in a particular workplace, executive-level whistleblowers often have access to information about company-wide policies and practices and unlawful activity by upper management. In addition to their bird’s-eye view of corporate activity, executive-level whistleblowers often handle highly confidential documents and engage with and seek advice from the highest levels of management, including corporate legal counsel. They may also be subject to legal duties that do not attach to employees in non-managerial positions. As a result, attorneys for executive-level whistleblowers must be cognizant of a number of issues that can impact retaliation claims, and clients’ eligibility for federal whistleblower rewards programs.

II. Gatekeepers: In-House Counsel and Compliance Officers

A. Protected Activity

Representing executive-level whistleblowers, such as in-house counsel and corporate compliance officers, presents unique issues due to the nature of their function within an organization. Employees in these roles often have access to the most sensitive, confidential corporate information, some of which relates directly to whether certain conduct is lawful. As a result, in-house counsel and compliance officers are ideally situated to identify and report instances when management has deliberately (or negligently) engaged in unlawful activity. Employees in these roles also have unique duties, however, under state and federal law and rules of professional conduct, as well as under the norms of corporate culture. Due to their involvement with sensitive information, in-house attorneys and compliance personnel are held to high standards of confidentiality and discretion that can have a significant impact on their rights as whistleblowers.

As whistleblower protections expand, lawmakers and courts are more clearly articulating the way in which in-house counsel and compliance officers can avail themselves of whistleblower protections, but much remains unsettled in this area. These issues have been addressed most directly in the context of the Sarbanes-Oxley Act of 2002 (“SOX”), 10 U.S.C. § 1514A, and the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), 15 U.S.C. § 78u-6, and accompanying regulations promulgated by the Securities and Exchange Commission (“SEC”). As regulators have developed a keener understanding of how attorneys and compliance

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1 SOX and Dodd-Frank have received much attention in recent years as the SEC has engaged in high-profile, high-recovery enforcement efforts, and whistleblowing activity related to securities fraud has increased apace. There are, of course, various other federal whistleblower statutes applicable to workers in fields such as nuclear energy, transportation, environmental, aviation, etc. See, e.g., Energy Reorganization Act, 42 U.S.C. § 5851; Surface Transport Assistance Act, 49 U.S.C. § 31105; Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121; Clean Air Act, 42 U.S.C. § 7622. Where the language and structure of these statutes is similar, as is often the case, courts and agency tribunals generally construe their provisions consistently across the field of whistleblower law (although precedent does evolve uniquely in each jurisdiction). For an overview of state and federal
personnel can facilitate the exposure of wrongdoing, corporate interests have responded by decrying any move to incentivize whistleblowing by the very people upon whom they rely for open discussion of regulatory matters.\(^2\) Current regulations attempt to balance the benefits of whistleblowing by these employees (particularly when it protects investors from significant harm) with the benefit of protecting internal procedures that encourage voluntary compliance with the law.

For in-house counsel, a major issue is whether privileged communications can be used to report unlawful conduct and/or to show that the attorney was retaliated against after making such a report, whether internally or externally. The SEC’s rules for attorneys practicing before the Commission, widely known as “Part 205,” provide guidelines that are balanced in favor of disclosure, but their authority is contested and unclear. Part 205 requires in-house counsel to first report “material violations” of SEC regulations to a corporation’s Chief Legal Officer (CLO), for example. 17 C.F.R. § 205.3(b). If the CLO does not make an “appropriate response in a reasonable amount of time,” the in-house attorney is then required to report the violation to the board of directors or a board committee. 17 C.F.R. § 205.3(b)(3). The SEC does not mandate that in-house attorneys must then, or at any time, report violations to the Commission itself, but the Commission does provide that attorneys may disclose confidential information without permission from their employer, i.e. “report out,” in the following circumstances: (1) to prevent a material violation that will cause “substantial injury to the financial interests or property of the [company] or investors;” (2) to prevent the company from engaging in perjury or fraud on the Commission; or (3) to rectify a material violation causing substantial injury to the financial interests of the company or investors that involved the use of the attorney’s services. 17 C.F.R. § 205.3(d)(2).

While Part 205 allows for disclosure of confidential information by in-house attorneys to federal regulators, there is debate over whether the SEC has the legal authority to override local legal ethics rules about disclosure of privileged and/or confidential client information. The SEC has attempted a kind of self-executing protective rule for attorneys by declaring: “Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, [Part 205] shall govern.” 17 C.F.R. § 205.1.\(^3\) This declaration simply begs the question of whether a federal agency can preempt local rules, however. The New York County Lawyers’ Association issued a formal opinion in 2013 stating that disclosures in violation of state ethics rules would be subject to discipline, regardless of the SEC’s attempt to carve out exceptions, and California Bar Association committees have also disputed whether the SEC’s authority

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\(^2\) See also, 17 C.F.R. § 205.6(c) (“An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.”).

\(^3\) For the official account of the comments received during the SEC’s final rulemaking process related to the whistleblower reward program established by Dodd-Frank, see 76 Fed. Reg. 34,300 et seq. (June 13, 2011).
overrides its local rules. There has been no formal challenge to the SEC’s Part 205 to date and thus no judicial determination of whether federal or state rules govern attorney disclosures to the Commission; in-house counsel and their employment attorneys must therefore navigate these waters with little certainty.

Regarding the use of privileged communications in the course of retaliation claims, the Department of Labor Administrative Review Board (ARB) and at least one federal court of appeals have held that attorneys may introduce these communications as evidence to the degree necessary for their claim. See Van Asdale v. Int’l Game Tech., 577 F.3d 989 (9th Cir. 2009); Jordan v. Spring Nextel Corp., ARB No. 2005-SOX-41 (ARB Sept. 30, 2009). These tribunals have made clear that attorney-litigants must limit disclosures to protect client information as much as possible. To avoid discipline by state ethics authorities and to preserve claims to the greatest extent, it is therefore advisable that in-house attorneys and their representatives use careful judgment in determining the volume and scope of disclosures.

In addition to these privilege issues relevant to in-house counsel whistleblowers, there is also the more general question of whether in-house counsel or compliance personnel may engage in protected activity in the course of fulfilling their duties, and therefore come within the retaliation protections of any number of federal whistleblower statutes. Some courts have held that litigants whose job includes a reporting or compliance-related function engage in protected activity only when they have “stepped outside” from their normal duties and made a report of unlawful activity in a manner that is above and beyond what is required by the nature of their positions. See, e.g., Lukov v. Schindler Elevator Corp., 594 F. App’x 357, 358 (9th Cir. 2015) (noting “the federal ‘step outside of his role’ rule’); U.S. ex rel. Brown v. Aramark Corp., 591 F. Supp. 2d 68, 77 (D.D.C. 2008) (holding in an FCA case that “notice [of fraud to the employer] stemming from the performance of one’s normal job responsibilities is typically inadequate [to establish protected activity].”). This “step outside” doctrine (also known as the “manager rule”), originally developed in the context of Fair Labor Standards Act, can potentially impose significant restrictions on protected activity by in-house attorneys and compliance officers because their positions require them to review and evaluate the legality of corporate activity. As such, they would nearly always have to show that they did more than simply fulfill the duties of their role in order to come within

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4 See NYCLA Committee on Professional Ethics, Formal Opinion 746 (2013), at 15 (“New York lawyers, in matters governed by the New York RPC, may not disclose confidential information under the Dodd-Frank whistleblower regulations, except to the extent permissible under the Rules of Professional Conduct.”); Ethics Alert, The New SEC Attorney Conduct Rules v. California’s Duty of Confidentiality (Spring 2004), available at http://ethics.calbar.ca.gov/Portals/9/documents/Publications/EthicsHotliner/Ethics_Hotliner-SEC_Ethics_Alert-Spring_04.pdf. Note that most jurisdictions either require or permit attorneys to disclose privileged information to avoid assisting in the commission of a crime. See, e.g., N.J. Prof. Conduct 1.6(b) (requiring disclosure in order to prevent illegal or fraudulent acts); N.Y. R. Prof. Conduct 1.6(b) (permitting disclosure of confidential information to, inter alia, prevent the commission of a crime).

the protections of anti-retaliation provisions. See *Weeks v. Kansas*, 503 F. App’x 640, 642 (10th Cir. 2012) (holding that an attorney is not engaged in protected activity under Title VII when she is “acting within her role as counsel… and simply seeking to assist [her employer] in fulfilling its legal obligations”).

The step outside doctrine has sway in some jurisdictions under a variety of federal statutes, such as Title VII, the FCA, and the Fair Labor Standards Act (FLSA). See, e.g., *Coleman v. G4S Secure Sols. (USA)*, Inc., No. 16-10250, 2016 WL 7439197, at *5-6 (E.D. Mich. Dec. 27, 2016) (discussing the step outside doctrine as it applies to human resources personnel); *Lasater v. Texas A & M Univ.-Commerce*, 495 F. App’x 458, 461-62 (5th Cir. 2012). While there is little case law regarding the doctrine under SOX, the Administrative Review Board has ruled that it does not generally apply to such claims and at least one federal court has deferred to this position. See *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 530 (S.D.N.Y. 2014) (noting that the ARB “has made clear that an employee may engage in protected activity even where the employee is discharging her duties,” and deferring to the agency’s determination); *Robinson v. Morgan–Stanley*, ARB Case No. 07–070, 2010 WL 2148577 (ARB Jan. 10, 2010). In addition, at least one DOL administrative law judge has ruled that the doctrine is not appropriate for SOX retaliation claims brought by in-house counsel, because the SEC has expressly authorized (and sometimes requires) these attorneys to make reports to management about unlawful activity. See *Leznik v. Nektar Therapeutics, Inc.*, 2006-SOX-00093 (ARB Nov. 16, 2007).

The Supreme Court’s decision in *Crawford v. Metropolitan Government of Nashville*, 555 U.S. 271 (2009), suggests that the Court might reject the “step outside” doctrine if given the opportunity to rule on the question directly. In *Crawford*, an employee brought a retaliation claim under Title VII when she suffered adverse actions after recounting harassment during an internal investigation of her supervisor. The employee had not initiated the complaint leading to the investigation, nor had she reported the harassment independently outside of responding to questions. The employer argued that in merely answering questions posed by an investigator, the employee had not “opposed” the discriminatory conduct, as required for protected activity under Title VII. The Court rejected this argument, holding that any account of harassing conduct comprised opposition for the purposes of retaliation; the employee did not have to more to qualify for protection. The decision suggests that the Court is generally supportive of finding protected activity where employees bring unlawful conduct to light, even without taking exceptionally active steps to do so. In a case where in-house counsel or a compliance officer has been subjected to an adverse action following her efforts to address such conduct, *Crawford* provides a strong foundation for finding protected activity.7

6 Courts have also addressed this issue when construing state whistleblower statutes. See, e.g., *Harrison v. Granite Bay Care, Inc.*, 811 F.3d 36, 51 (1st Cir. 2016) (holding that under Maine’s Whistleblower Act, “although a particular employee’s job duties may be relevant in discerning his or her actual motivation in reporting information, those duties are not dispositive of the question”).

7 The EEOC has relied upon *Crawford* for its position that the “manager rule” does not apply to retaliation claims under its jurisdiction. See U.S. Equal Employment Opportunity Commission, Proposed Enforcement Guidance on Retaliation and Related Issues (Jan. 21, 2016) at 11-16, available at https://www.regulations.gov/#/documentDetail;D=EEOC-2016-0001-0001.
B. Eligibility for Whistleblower Rewards Programs

In addition to the protections against retaliation set out in SOX, Dodd-Frank, and other federal statutes, there are also a number of whistleblower rewards programs that provide sizeable payments to individuals who assist in bringing enforcement actions against corporate lawbreakers. The SEC Office of the Whistleblower administers one of the highest-profile reward programs, established by Dodd-Frank. The statute provides that whistleblowers who voluntarily provide original information leading to a successful enforcement action that results in sanctions of $1 million or more are eligible to receive awards of 10-30% of the total amount collected by the Commission. Similar rewards programs are administered by the Commodities Futures Trading Commission (CFTC) and the Internal Revenue Service (IRS). While retaliation claims raise the question of whether in-house attorneys and compliance officers should be protected for blowing the whistle on illegal conduct, whether within or outside of their normal job duties, whistleblower rewards programs raise the even more difficult question of whether these employees should be actively incentivized to reach out to regulators.

The SEC has acknowledged that its reward program creates potential conflicts of interest for in-house attorneys in particular, who might prefer to go to regulators with concerns in order to qualify for a significant monetary award rather than report internally and facilitate compliance from within their companies. To maintain access to information that might otherwise go undetected, while still encouraging voluntary compliance with regulations, the SEC has established general exclusions for reward eligibility and a number of relatively narrow exceptions to these exclusions. With respect to attorneys, there is no eligibility for an award if information provided to the Commission is obtained through (1) communications subject to a attorney-client privilege, unless those communications may be disclosed under Part 205 or state ethical rules, or...

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9 17 C.F. R. § 165. The CFTC program has made just four awards since it was established by Dodd-Frank in 2010, with one award totaling $10 million dollars-plus to a single whistleblower. See Press Release, CFTC Announces Whistleblower Award of More Than $10 Million, available at http://www.cftc.gov/PressRoom/PressReleases/pr7351-16.


11 See 76 Fed. Reg. 34,300, 34,314 (June 13, 2011) (“[C]ompliance with the Federal securities laws is promoted when individuals, corporate officers, and others consult with counsel about possible violations, and the attorney-client privilege furthers such consultation. This is an important benefit that could be undermined if the whistleblower award program created monetary incentives for counsel to disclose information about possible securities violations in violation of their ethical duties to maintain client confidentiality.”) (footnotes omitted).
(2) legal representation of a client, unless disclosure is permitted under Part 205, state ethical rules, or otherwise. 12 17 C.F.R. § 205.3(d)(2); 17 C.F.R. §§ 240.21F-4(b)(i)-(ii). As discussed above, it is not at all clear how Part 205 interacts with state ethics rules, many of which explicitly prohibit disclosures that are permitted by the SEC; as a result, the exceptions and exclusions for attorneys provide little clear guidance.

With regards to compliance officers, the SEC program has also established general exclusions, with narrow exceptions, that significantly narrow their eligibility for rewards. Among the people who are ineligible for whistleblower awards are: (a) an officer, director, trustee, or partner of an organization who was informed of misconduct by another person, or the employee learned of the information from the organization’s processes for reporting violations; (b) an employee with principal duties related to compliance or internal auditing, or an employee of a firm carrying out those functions; (c) an employee of a firm conducting an inquiry or investigation of unlawful conduct; or (d) an employee of a public accounting firm who has learned the information through an audit required under federal law. C.F.R. § 240.21F-4(b)(iii). 13 Notwithstanding these exclusions, compliance personnel can be eligible to receive an award if the employee reasonably believes that disclosure is necessary to prevent conduct resulting in substantial injury to the financial interest or property of the company or investors; that the company is engaging in conduct that will impede investigation of wrongdoing; or at least 120 days have passed since the employee provided the information to the audit committee, Chief Legal Officer, or other executive or supervisory officers, or the information was received in a way to suggest that these personnel were already aware of its content. C.F.R. § 240.21F-4(b)(v). At least two compliance officers have received whistleblower awards under these exceptions, totaling $300,000 and $1.4 million-plus, proving that they are not merely theoretical paths to a reward. 14

While the FCA is not technically a “rewards” program, it also authorizes individuals to receive between 15-25% of the proceeds from successful actions brought against companies that defraud the government. 31 U.S.C. § 3730. Just as the SEC has acknowledged the need to balance whistleblower incentives with confidential access to legal counsel, courts have been careful to take ethical obligations into account when evaluating FCA claims by attorneys. Stopping short of an outright categorical bar on attorneys acting as FCA “relators” (i.e. individuals litigating on behalf of the government), courts have generally refused to release attorney-relators from their ethical

12 While most often applicable to attorneys, these exclusions apply to non-attorneys, well. Id. at 34,315 (“[B]oth exclusions apply to non-attorneys. Thus, if an attorney in possession of the information would be precluded from receiving an award based on his or her submission of the information to us, a non-attorney who learns of this information through a confidential attorney-client communication would be similarly disqualified.”).

13 The SEC also excludes information obtained through criminal means. C.F.R. § 240.21F-4(b)(iv).


III. Retaining and Disclosing Corporate Documents

Most attorneys who represent whistleblowers have encountered the issue of whether their clients have accessed, retained, and/or disclosed confidential documents in the course of reporting unlawful conduct or pursuing a legal claim following subsequent retaliation. In the case of executive-level clients, it is almost certain that confidential documents will be involved due to the reliance on written communication such as email, intraoffice messaging, memoranda, and reports by upper management. Confidential documents raise a variety of concerns for both clients and their legal representatives, including potential counterclaims related to confidentiality agreements and fiduciary duties (discussed in more detail below), for-cause termination due to violations of employer policies, discipline from professional ethics authorities, and even criminal liability.

While many courts recognize that whistleblowing will almost always require the disclosure of confidential information, and that whistleblower protections passed by state and federal legislators establish a public policy in favor of protecting such disclosures, courts have rejected indiscriminate use of employer information by whistleblower employees. See, e.g., United States ex rel. Cafasso v. General Dynamics C4 Systems, Inc., 2009 U.S. Dist. LEXIS 43154 (D. Ariz. May 21, 2009), aff’d 637 F.3d 1047 (9th Cir. 2011). Tribunals have been most willing to find that the use of confidential employer information is protected activity where the employee has been able to show that she did not obtain the documents through nefarious means and disclosed them in a limited way that was related to her report of wrongdoing. See e.g., Erhart v. BofI Holding, Inc., No. 15-CV-02287-BAS-NLS, 2017 WL 588390 (S.D. Cal. Feb. 14, 2017) (retention of narrowly selected confidential documents, including on employee’s personal computer and personal email account, constituted protected activity); Vannoy v. Celanese Corp., 2008-SOX-00064, (ARB July 24, 2013).

One recent decision by a federal court in California found that a whistleblower had appropriately limited his retention and use of confidential information. In Wadler v. Bio-Rad Labs., Inc., No. 15-CV-02356-JCS, 2016 WL 7369246 (N.D. Cal. Dec. 20, 2016), the court denied a motion to exclude evidence the plaintiff sought to admit at trial, finding that 17 C.F.R. § 205, which permits an attorney to use evidence “in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue,” was “sufficiently broad to support the conclusion that it applies to whistleblower claims asserted in litigation” and “to the extent California’s ethical rules allow for more limited disclosures of privileged and confidential communications in connection with Sarbanes-Oxley whistleblower retaliation claims than is permitted under the regulations promulgated by the SEC, there is a direct conflict that gives rise to preemption of California’s ethical rules.”
The unauthorized use of corporate documents is often expressly prohibited by confidentiality clauses included in employment agreements, or under employer policies, and can therefore constitute lawful grounds for termination that preclude a retaliation claim. While this entire area of law is somewhat unsettled, False Claims Act precedent is arguably the most protective of employees’ use of confidential information. See, e.g., Shmushkovich v. Home Bound Healthcare, Inc., No. 12 C 2924, 2015 WL 3896947, at *2 (N.D. Ill. June 23, 2015) (noting that the “Seventh Circuit has… recognized a broad policy interest in fostering employee actions under the False Claims Act”) (internal quotation marks and citation omitted). Even within FCA cases, however, courts have been careful to stress that indiscriminate collection and retention of confidential information is not protected activity. See U.S. ex rel. Rector v. Bon Secours Richmond Health Corp., No. 3:11-CV-38, 2014 WL 66714, at *6 (E.D. Va. Jan. 6, 2014) (“It is true that the FCA contemplates whistleblower possession of documents obtained from employers that evidence fraud upon the government. However, the FCA does not permit whistleblowers to have carte blanche to acquire such information in any way they deem necessary.”) (internal citation omitted); Cafasso (holding that accessing and retaining large amounts of employer data, including proprietary information and patents, was not protected activity under the FCA). In retaliation cases under Title VII, the Age Discrimination in Employment Act (ADEA), and SOX, courts have also held that employees who retain or disseminate confidential documents in an unreasonable manner that goes beyond what is necessary to report wrongdoing or prove retaliation will not be protected from discipline or termination when such prohibitions are in place.15 See, e.g., Smith v. Chicago Transit Auth., No. 12 C 8716, 2014 WL 3892233, at *9 (N.D. Ill. Aug. 5, 2014) (noting the five-factor balancing test for “reasonable” disclosure in Title VII retaliation claims set out in Niswander v. Cincinnati Insurance Co., 529 F.3d 714, 722 (6th Cir. 2008)); Aldrich v. Rural Health Servs. Consortium, Inc., 579 F. App’x 335, 337 (6th Cir. 2014) (holding that an employee did not engage in protected activity under the ADEA when she “indiscriminately” sent confidential employer documents to her personal email account and refused to delete them); JDS Uniphase Corp. v. Jennings, 473 F. Supp.2d 697 (E.D. Va. 2007) (holding that a former accountant was not protected by SOX for retaining documents that he was otherwise prohibited to disclose under the terms of his confidentiality agreement).

Some plaintiffs have successfully argued that enforcement of a confidentiality policy was mere pretext for their retaliatory termination, particularly where the temporal proximity of protected activity and termination was unusually close, or where violation of the policy was in dispute. See, e.g., Gibson v. Reliant Renal Care-Alabama, LLC, No. 7:14-CV-02002-LSC, 2016 WL 1212611, at *6-7 (N.D. Ala. Mar. 29, 2016) (noting that one month proximity between activity and adverse action raised issued of fact regarding pretext); O’Donnell v. Caine Weiner Co., LLC, No. 14 C 6839, 2016 WL 693204, at *4 (N.D. Ill. Feb. 22, 2016) (denying summary judgment where, inter alia, plaintiff asserted that she obtained confidential documents inadvertently); Boddy

15 The reasonableness test has developed out of Title VII opposition-to-discrimination cases, and is not necessarily applicable to cases involving an employee’s participation in a discrimination case. See, e.g., Randolph v. ADT Sec. Servs., Inc., No. CIV.A. DKC 09-1790, 2011 WL 3476898, at *6 (D. Md. Aug. 8, 2011) (holding in a FLSA retaliation case that the reasonableness test does not apply to participation-retaliation claims).
v. Astec, Inc., No. 1:11-CV-123, 2012 WL 5507298, at *12 (E.D. Tenn. Nov. 13, 2012) (noting that a plaintiff may show pretext by establishing that a confidentiality policy was selectively enforced). The balance of cases, however, indicates that courts are unwilling to condone generalized retention and dissemination of confidential employer information. Attorneys should therefore warn executive-level whistleblower clients of the risks associated with the possession and use of such information and should determine whether it is appropriate to review confidential documents for use in legal action. As a general rule, courts have been most amenable to excusing employees from confidentiality restrictions where dissemination has been made in the most limited manner possible (i.e., to legal counsel and/or government officials as required to establish a cognizable legal claim, and in no event released in a public forum or on social media).

IV. Counterclaims Against Executives

Employers facing retaliation claims frequently threaten, and occasionally file, counterclaims against employees to deter legal action and signal to current employees that such action holds significant risks. Because executives are charged with greater legal duties towards their employers, whether implied or expressly provided in employment contracts, they are typically more susceptible to counterclaims than lower level employees. Representation of executive-level whistleblowers should therefore include an assessment of counterclaim exposure for the most accurate assessment of the case and realistic expectations for litigation. 16

Nearly all executives are subject to employment contracts that contain confidentiality provisions for proprietary and sensitive corporate information. These terms typically prohibit an employee from disseminating such information outside of the company and from retaining documents after their separation from the company. As discussed above, these agreements can potentially restrict an employee’s use of documents in reporting wrongdoing and bringing a retaliation claim. They can also provide grounds for a breach of contract counterclaim should the employee move forward with litigation. In such cases, whistleblowers have had some success arguing that enforcement of these contract provisions would violate public policy. See, e.g., Erhart, 2017 WL 588390 at *6-13 (“reasonably necessary” protected activity can provide an affirmative defense against enforcement of a confidentiality agreement); Saini v. International Game Technology, 434 F. Supp.2d 913, 923 (D. Nev. 2006) (confidentiality agreements may be unenforceable where an employee has acted as a whistleblower for illegal or “wrongful” behavior). Courts have not been willing, however, to provide blanket protection to breaches of contract for use of confidential information, particularly where some of the information is unrelated to protected activity. See Erhart, 2017 WL 588390 at *15-16 (disclosures to press would not provide exception to enforcement of confidentiality agreement); Cafasso, 2009 U.S. Dist. LEXIS 43154 (ruling that confidentiality agreements are enforceable even where an employee purports to use employer information to report wrongdoing); Zody v. Microsoft Corp., No. C-12-00942-YGR, 2013 WL 2468250, at *5 (N.D. Cal. June 7, 2013) (denying a motion to dismiss breach of contract counterclaim related to plaintiff’s use of confidential documents for wrongful termination action).

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16 Attorneys should also be mindful that threats of civil or criminal complaints against an employee can themselves constitute an adverse action of unlawful retaliation. See, e.g., Brown v. TD Bank, N.A., No. CV 15-5474, 2016 WL 1298973, at *6-7 (E.D. Pa. Apr. 4, 2016).
In situations where an employee’s disclosures related to criminal activity, there is also a strong public policy argument established by the criminal code itself that disfavors breach of contract claims.

Another potential counterclaim that is more likely to arise for executive-level whistleblowers than other employees is breach of fiduciary duty. General agency principles require that an employee not use or communicate information obtained through employment unless the information is already generally known. Restatement (Second) of Agency § 395. There are few reported decisions addressing breach of fiduciary duty claims against whistleblowers, but unfortunately most of this small sample indicates that courts are willing to allow these claims to move forward. See, e.g., Nesselrote v. Allegheny Energy, Inc., 615 F. Supp.2d 397, 410 (W.D. Pa. 2009) (finding a breach of fiduciary duty where an employee retained confidential information to support an age discrimination claim); but see Erhart, 2017 WL 588390 at *17 (“It is implicit in the various whistleblower protection provisions that if an employee is permitted to provide information regarding believed wrongdoing to the government, including documents, the employer cannot then seek to impose tort liability on the employee for the same conduct.”). The paucity of case law in this area suggests that fiduciary duty counterclaims are uncommon, but whistleblowers and their counsel should be cognizant of potential liability related to the dissemination of company information in the course of their activities.

Even less likely than the foregoing counterclaims, but more serious in its potential for life-altering consequences, is the possibility of criminal liability for conduct related to blowing the whistle on unlawful activity. In a small number of high-profile cases, former employees have faced criminal prosecution for accessing and providing to the press company documents related to aviation safety, accessing and releasing information related to voter machine fraud, and reporting fraudulent medical practices to a state regulatory authority. 17 In one exceptionally unusual case, a whistleblower who brought massive tax fraud to the attention of the IRS and eventually earned a $104 million reward for his assistance was sentenced to 40 months in prison for his role in the scheme. 18 Charging decisions by prosecutors are highly discretionary and often difficult to predict. Legal counsel for executive whistleblowers should familiarize themselves with all potentially relevant criminal offenses, applicable statutes of limitations, and, to the extent possible, charging priorities in the relevant jurisdictions.

In light of the reliance on computer-based communications in almost every workplace, representatives for executive-level whistleblowers should pay particular attention to statutes such as the Computer Fraud and Abuse Act of 1986 (“CFAA”), 18 U.S.C. §1030 et seq., which can be

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an especially potent source of liability for whistleblowers. The CFAA includes a criminal provision for the unauthorized access of computers in interstate commerce, and a civil action for various acts of computer access “without authorization or exceeding authorized access.” 18 U.S.C. § 1030(a). There is a significant split among federal circuits over how to construe “authorization” for computer access in the workplace under the CFAA. The most draconian construction, adopted by the Fifth, Seventh, and Eleventh Circuits, holds that an employee acts without authorization whenever she acts against interests of her employer or in breach of her duty to her employer. Other courts, such as the Fourth and Ninth Circuits, have held that employees do not violate the CFAA so long as they were authorized to access the employer’s computer system at the time they did so, notwithstanding their subsequent use of the information obtained. Criminal liability is an unlikely outcome for most whistleblowers, but it is not without precedent. Whistleblowers and their representatives should review relevant state and federal criminal laws related to documents and underlying conduct to assess these risks and minimize them where possible.

V. Disclosures to Government Officials

For many whistleblowers, full-blown litigation is an intensely disruptive, stressful, and uncertain path to recovery. In most cases, if not all, the former employee is better served by entering into a voluntary settlement agreement that sets out mutually agreeable terms of departure. In addition to the standard release of claims, confidentiality, and non-disparagement clauses that nearly all such agreements contain, representatives for whistleblowers should be on guard against attempts to secure the employee’s agreement to refrain from communications with government officials about matters related to their employment, and/or to decline any recovery that might flow from regulatory enforcement. Such provisions are contrary to public policy and the equitable interests of the whistleblower.

On the first issue of reports to government agencies, there is a clear public interest in the disclosure of wrongdoing to those charged with the protection of civil rights, health and safety, and consumer protection. Despite this clear and self-evident principle, only the SEC has promulgated a rule expressly providing that confidentiality agreements cannot be enforced where they would prevent an employee from providing information to the Commission related to a securities violation. 17 C.F.R. § 240.41f-17(a). In April 2015, the SEC brought its first enforcement action against an employer for requiring employees to sign confidentiality agreements during internal investigations that required them to vet all disclosures with the corporate legal department. Following the SEC’s investigation, the employer agreed to pay a $130,000 penalty and amended its confidentiality agreements to clarify that employees are permitted to make reports of securities violations to the Commission without fear of reprisal. The SEC has continued to take

19 See, e.g., United States v. John, 597 F.3d 263 (5th Cir. 2010); International Airport Centers LLC v. Citrin, 440 F.3d 418 (7th Cir. 2006); United States v. Rodriguez, 628 F.3d 1258 (11th Cir. 2010), cert. denied 563 U.S. 966 (2011).


enforcement action against companies who attempt to limit employee disclosures to the government or limit their eligibility for government whistleblower award programs.\(^\text{22}\)

For reports to other government agencies, employees who have entered into confidentiality agreements without such carve-outs potentially face breach of contract claims from their former employers. Public policy arguments that have been effective in the FCA context, as noted above, might prevail against a breach of contract claim, particularly in jurisdictions with favorable whistleblower precedents. Whistleblowers could nevertheless face considerable costs in responding to or defending these claims. An explicit carve out is therefore an important part of any settlement agreement.

On the second issue of whether an employee should agree to forgo any financial recovery related to a report to a government agency (i.e., a whistleblower reward), representatives for whistleblowers should also advocate vigorously against such provisions. Employers enter into settlement agreements in part to bring a dispute to a final resolution, with the assurance that they will have no further, indeterminate financial liability to the individual going forward. This legitimate interest is not implicated, however, by an employee’s eligibility for a whistleblower award under any current federal programs because awards are not paid from the employer to the employee in these matters. Employers instead pay penalties to the federal government for violations of the law, and agency authorities then make independent and discretionary decisions about issuing a reward to the whistleblower. The amount of a whistleblower’s award is thus determined by the amount recovered from the corporation, but is not paid directly from it. As such, there is no duplicative recovery by the employee from the employer, nor additional liability that is created through operation of the rewards programs.

VI. Conclusion

Representing executive-level whistleblowers requires attorneys to be aware of many nuanced issues for which clear guidance is often sparse. An executive’s broad access to confidential corporate information can provide strong evidence of unlawful conduct and retaliation, but this access is often accompanied by implied and express duties that can also significantly constrain that executive’s legal position. On the employer’s side, the stakes are high when facing the potential claims of an executive-level whistleblower; settlement will be more expensive than in the case of a lower-level employee, yet litigation also has substantial economic and reputational risks. Employers therefore have increased incentives to find effective ways to thwart retaliation claims by executives and stifle reports to regulators. Attorneys for executive

whistleblowers must therefore be aware of and consider all of the unique issues that may arise in order to most effectively represent their clients.