State of Whistleblower Protection Laws After One Year of the Trump Administration

American Bar Association
Section of Labor and Employment Law
November 2017

Program Agenda

- Federal Sector Whistleblower Laws
- Dodd-Frank and SEC Whistleblower Enforcement
- Sarbanes-Oxley and Protected Conduct
- OSHA Whistleblower Enforcement
- FRSA and Retaliatory Motive
- Other Recent Decisions and Developments
- Questions

Federal Sector Whistleblower Overview

Federal workers can make whistleblower disclosures of government wrongdoing to, among other places, the U.S. Office of Special Counsel (OSC).

Federal workers can file complaints of whistleblower retaliation with OSC.

The Merit Systems Protection Board (MSPB) is the administrative tribunal that decides cases before the case may proceed to federal court.

Federal Employee Leakers and Whistleblowers: What's the Distinction?

Whistleblowers

The Whistleblower Protection Act (WPA) protects whistleblower disclosures by federal government employees.

The WPA prohibits retaliation for disclosing information that a federal employee reasonably believes evidences "any violation of any law, rule or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety," unless specifically prohibited by law.

Protected disclosures may be made through many different channels.

Leakers

Loosely, employees who unlawfully disclose information outside of prescribed channels.

For example, a disclosure of classified information to the media about waste, fraud, or abuse is not authorized under law.

Disclosures about such classified information may be made to OSC, an Inspector General, or other individuals designated by agency head.

Rainey v. MSPB and the Follow the Rules Act

Rainey – Background

MacLean – held that the WPA's language prohibiting disclosures "specifically prohibited by law," does not extend to "rules" or "regulations"

Rainey, a State Department employee, refused to force a contractor to rehire a previously discharged subcontractor (would have violated a regulation)

Rainey's superiors subsequently gave him negative performance ratings and took away his contracting officer duties

Rainey – Background

Based on the holding in *MacLean*, the U.S. Court of Appeals for the Federal Circuit held that Rainey's refusal of an order that would have violated a regulation was not a protected disclosure under the WPA.

Congress acts with (relatively speaking) lightning speed in clarifying this, and the "Follow the Rules Act" is signed into law on June 14, 2017.

Follow the Rules Act

Before (FRA):

- If a Federal employee refuses follow an order to violate a Federal law → Federal employee is protected from employment retaliation by WPA
- If a Federal employee refuses follow an order to violate a Federal rule or regulation → Federal employee is not protected from employment retaliation by WPA

Follow the Rules Act

- After (FRA):
  - If a Federal employee refuses follow an order to violate a Federal law, rule or regulation → Federal employee is protected from employment retaliation by WPA

Other Whistleblower Developments in the Federal Sector Since the Dawn of President Trump

Vocke v. MSPB & Musselman v. Army

Holding: Petitions for rehearing en banc denied, where in the Court's panel decisions, the Federal Circuit found it lacked jurisdiction because the timeliness requirement of 5 U.S.C. § 7703(b)(1)(A) is jurisdictional in nature and is not subject to equitable tolling.

When pro se petitioners are led by a court's guidance for pro se petitioners and appellants – as was the case in *Fedora* and in the IRA appeals considered in *Vocke* and *Musselman* – to what extent does "fundamental fairness" allow for judicial consideration of equitable tolling?

Miller v. Department of Justice

Holding: Federal Circuit reversed Board's holding because it was not supported by substantial evidence, where Board found that petitioner's disclosures were protected and were a contributing factor in his reassignment, but that agency proved by clear and convincing evidence that it would have reassigned petitioner notwithstanding his disclosures.

There is significant disagreement on application of *Carr* Factors to these facts.

Dodd-Frank Whistleblower Program: "Game-Changer" in Enforcement

Eligibility

- Voluntarily provides the SEC with **original information** about violation of the federal securities laws
- Information provided must lead to a **successful SEC action** resulting in an order of monetary sanctions **exceeding $1 million**
- Need not be employed at the company to make an eligible disclosure
- Payment can range from 10% to 30% of collected sanctions

Original Information

- is derived from the independent knowledge or analysis of a whistleblower;
- is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and
- is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information. 15 U.S.C. §78u-6(a)(3)

Arguments Against Rewarding Whistleblowers

Undermines compliance programs

Creates perverse financial incentives for employees responsible for identifying and investigating misconduct

Encourages employees to delay reporting

Is the SEC Whistleblower Program Successful?

SEC Whistleblower Program Track Record

One Billion Reasons Why The SEC Whistleblower-Reward Program Is Effective, **Forbes**, July 18, 2017

- **$1B** in sanctions
- **$150M** paid to whistleblowers
- **18,000** tips from whistleblowers in every state and from over 103 foreign countries

Success of SEC Whistleblower Program

Former Chair White "The SEC as the Whistleblower's Advocate" April 30, 2015

- quality of tips very high
- halt ongoing fraud
- build a case quickly
- incentive to self-report
- broad spectrum of violations, including market manipulation, offering fraud, and shareholder fraud

Supercharging Enforcement

- Solid investigative leads
- Admissions in recordings, text messages and emails
- Assistance deciphering documents

Impact on Internal Reporting

More than **80%** of whistleblowers disclosed wrongdoing internally prior to blowing the whistle to the SEC

Incentive to report internally before going to SEC

Disincentive to delay reporting

Key Facets of SEC Whistleblower Program

Anonymity

Protecting whistleblowers from retaliation

Prohibition against gag clauses in employment agreements and company policies

Sarbanes-Oxley Protected Conduct

SOX Protected Conduct

Federal courts are applying *Sylvester v. Parexel*:

- Disclosure of **potential violation** protected
- A complaint need not allege shareholder fraud
- SOX complainants no longer need to show that their disclosures "definitively and specifically" relate to the relevant laws
- No magic words required (e.g., fraud or misrepresentation)
- Reasonable but mistaken belief protected

SOX Protected Conduct

Murray v UBS Securities LLC et al, No. 14-00927 (S.D.N.Y. April 25, 2017)

Focus is "on the plaintiff's state of mind rather than on the defendant's conduct."

Because "[m]any employees are unlikely to be trained to recognize legally actionable conduct by their employers," an employee's "belief" in his employer's wrongdoing is "central[]" to the analysis of SOX-protected conduct.

SOX Protected Conduct

Why protect disclosures about potential violations?

"UBS's position implies that, for employees like Mr. Murray to be protected under SOX, they must 'actually capitulate to inappropriate influence, publish seemingly independent research that is in fact inaccurate or biased, and then blow the whistle.' *Id.* at 24.

But since section 806 was 'designed to encourage insiders to come forward without fear of retribution,' '[i]t would frustrate the purpose of Sarbanes-Oxley to require an employee, who knows that a violation is imminent, to wait for the actual violation to occur when an earlier report possibly could **have** prevented it. . . .'"

OSHA Enforcement

OSHA Enforcement

"Reasonable Cause" Standard

- OSHA's investigation must reach an objective conclusion that a reasonable judge could believe a violation occurred. The evidence does not need to establish conclusively that a violation *did* occur.
- "Although OSHA will need to make some credibility determinations to evaluate whether a reasonable judge could find in the complainant's favor, OSHA does not necessarily need to resolve all possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause to believe that a violation occurred."

Wells Fargo Whistleblower

April 3, 2017 OSHA ordered Wells Fargo to pay $5.4M to a bank manager who was abruptly dismissed after reporting suspected bank, mail and wire fraud

“We also have an anonymous ethics line.”

Wells Fargo former CEO John Stumpf 9-20-2016 Testimony

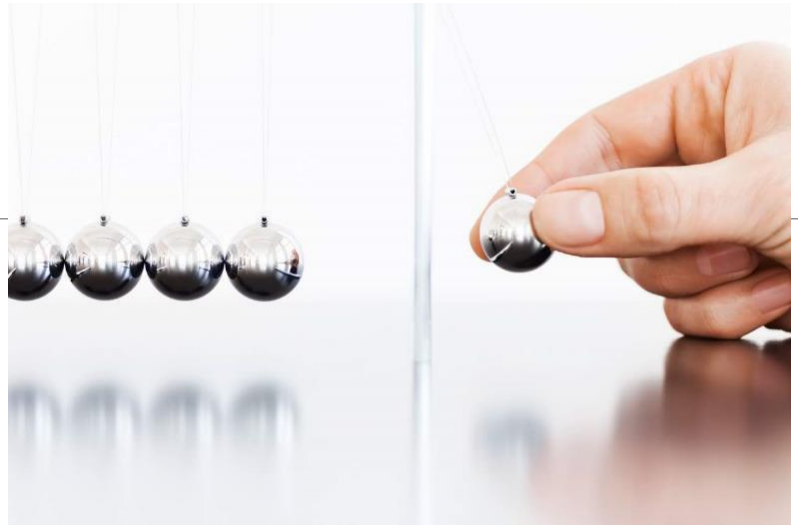
“**Each team member**, no matter where you are in the organization, **is encouraged to raise their hand**. If something is being asked of them that they think is not right, not consistent with our values and our culture, they're asked to raise their hand, they're asked to go to a manager's manager in HR. **We also have an anonymous ethics line**. They can speak up and show us and talk to us about anything going on. We want to hear from them, because we don't want this behavior.”

Not all employees were "encouraged to raise their hand."

I called the Wells Fargo ethics line and was fired, CNN Money 9-21-2016

"One former Wells Fargo human resources official even said the bank had a method in place to retaliate against tipsters. He said that Wells Fargo would find ways to fire employees 'in retaliation for shining light' on sales issues. **It could be as simple as monitoring the employee to find a fault, like showing up a few minutes late on several occasions**."

Must the Whistleblower Prove Retaliatory Motive?



Palmer ARB Decision Clarifying Burden-Shifting Framework

Palmer

- *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154 (Sept. 30, 2016) (en banc)
- "Contributing factor" = protected activity played some role—even an insignificant or insubstantial role—in the adverse action
  - Decision-maker knowledge of the protected activity and close temporal proximity will suffice to prove causation in some cases
  - Whistleblower need not prove pretext

Palmer

- **Employer's nonretaliatory reasons are not "weighed against" the employee's protected activity** to determine which reasons might be weightier.
- "Importantly, **if the ALJ believes that the protected activity and the employer's nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question** . . . Since the employee need only show that the retaliation played some role, the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity."

Palmer

- In contrast to Title VII, not a burden of production
- What is “clear and convincing evidence”?
  - Not enough for the employer to show that it could have taken the same action; it **must show that it would have taken the same action**
  - Quantified, the probabilities might be in the order of above 70%

Can Whistleblowers Use Company Documents to Report Fraud to the Government and to Bring Retaliation Claims?

SEC Enforcement of Dodd-Frank Anti-Gag Provision

Rule 21F-17(a) under the Exchange Act provides that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement … with respect to such communications."

SEC Enforcement of Anti-Gag Provision

SEC has taken steps to combat contractual provisions:

- Requiring employees to waive possible whistleblower awards
- Prohibiting employees from disclosing subject of internal investigation
- Requiring notice prior to responding to inquiry from SEC

Additional Prohibitions Against Gag Provisions

NLRB - *Whole Foods Mkt. Grp., Inc. v. N.L.R.B.*, No. 16-0002 (2d Cir. June 1, 2017).

EEOC Guidance

Federal Acquisition Regulation 3.909

CFTC Rule 165.19

OSHA 9/15/16 Guidance

Erhart v. BofI Holding, Inc.

Erhart v. BofI Holding, Inc., 2017 WL 588390 (S.D.Cal. Feb. 14, 2017)

The public policy protecting whistleblowers from retaliation, embodied in SOX and Dodd-Frank, clearly outweighs the interest in the enforcement of BofI's confidentiality agreement, and therefore agreement is unenforceable.

Whistleblowers permitted to take company documents to disclose fraud to the government:

- "[W]whistleblowers often need documentary evidence to substantiate their allegations."
- "Allowing a whistleblower to appropriate documents supporting believed wrongdoing also mitigates the possibility that evidence of the wrongdoing will be destroyed before an investigation can be conducted."

Erhart v. Bofl Holding, Inc.

Focus on “the nexus between the confidential documents in question and the misconduct alleged by the whistleblower.”

Burden is on the party seeking to invoke the public policy exception “to justify why removal of the documents was reasonably necessary” to support the allegations of wrongdoing.

Erhart v. Bofl Holding, Inc.

Key facts:

- Erhart was "careful in [selecting] the information [he] accessed and turned over. Each document was specifically related to one of the allegations of wrongdoing [he] had discussed with [his supervisor] and then reported to federal law enforcement"; and
- Every document Erhart used was "accessed in the course of performing [his] work as an internal auditor."

Where appropriation of confidential documents is "vast and indiscriminate," public policy in favor of whistleblowing might not immunize the whistleblower from potential liability.

Tips from Employee Perspective

Be cautious counseling a current employee to take documents

- Confirm dos and dont's in writing
- Warn client of risks, including after-acquired evidence
- Ideally, do not comingle personal and work data

Avoid mass, indiscriminate downloading

Assume that employer will perform forensic analysis of client's work computer and network activity

Avoid reviewing privileged documents

If client potentially has privileged communications, warn DOJ/SEC/CFTC so that they can screen the documents using taint team

Tips from Employee Perspective

Determine early on what client possesses and how client obtained the information

Warn client about gathering evidence post-termination or resignation

If pursuing only retaliation claim, consider having current employee index key documents and provide the documents to in-house or outside counsel for preservation

Consider retaining computer forensics expert to create bit-by-bit image of client's computer

Work with SEC/CFTC/DOJ to shield client's identity when agency requests documents from employer

Fifteen Years after the enactment of SOX,

has it been effective in combating the

“corporate code of silence”?

SOX Jury Verdicts

Wadler v. Bio-Rad

- $14.6M total recovery
  - $6M back pay (doubled under Dodd-Frank)
  - $5M in punitive damages, due largely to CEO creating new performance review *after* terminating Wadler's employment
  - $3.5M attorney fees

Wadler v. Bio-Rad

In-house counsel of 26 years allegedly fired for raising concerns about potential FCPA violations

Outside counsel found no FCPA violation

Post-hoc justifications

- HR claimed to have performed a threat assessment
- Referred to Wadler as a “monster”

Is it credible to employ a “monster” for 26 years?

Discovery revealed that CEO created last performance review one month after firing Wadler

Wadler v. Bio-Rad

Wadler v. Bio–Rad Labs., Inc., 2016 WL 7369246 (N.D. Cal. Dec. 20, 2016)

- Can a former in-house attorney use privileged information to prosecute a retaliation claim?
- CA Rule 1.6 does not permit disclosure to assert a claim
- SEC attorney conduct rules (17 C.F.R. Part 205) preempt California ethics rules
- Privileged information should be reasonably necessary to any claim or defense

Perez v. Progenics Pharmaceuticals

- Pro se whistleblower recovered nearly $5M
- Fired one day after writing memo accusing Progenics of public misrepresentation about clinical trial
- Refused to reveal how he obtained confidential document that was the basis of his disclosure

Perez v. Progenics Pharmaceuticals

$2.8M front pay award

- Reasonable retirement age of 66
- Applied for work for 7 years
- “manifest hostility” precluded reinstatement (CEO “condescending, contemptuous, and patronizing” to Dr. Perez)

Questions