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Practical Considerations for the Defense Upon Receiving Notice of a Whistleblower Claim

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I. Introduction

Whistleblower and retaliation claims have become more prevalent in recent years, fueled by the expansion in federal and state protections of employees, the now-regular publication of multi-million-dollar verdicts for whistleblowers, and the heightened awareness by employees – and their lawyers – as to the lucrative incentives available for reporting suspected misconduct by their employers.

Unlike most employment claims, which focus on the individual circumstances of the complaining employee, whistleblower cases often raise a disturbing array of allegations that challenge the integrity and business practices of the employer. These allegations, whether true or false, can harm the company's reputation and its relationships with customers, shareholders and governmental regulators. Companies and their counsel therefore must react promptly and with care to all such claims.

This paper gives a general overview of issues and tactics that in-house lawyers and defense counsel should consider when they are called upon to represent a client in relation to a whistleblower claim. As noted below, keys to the proper response include (1) a prompt and thorough investigation; (2) determining whether the allegations have merit under the law; (3) determining whether there is a threat to public health or safety, or other important interests, such as accusations of criminal conduct or financial wrongdoing; (4) taking appropriate remedial action, even if there is no violation of the law; and (5) developing a strategy to successfully deal with the complaining employee, whether through settlement or aggressive litigation.

We begin with a brief summary of major federal and state whistleblower laws, and then provide an outline of issues and actions that defense counsel should consider, when a whistleblower claim comes in.

II. Overview of Whistleblower Statutes

A. Federal False Claims Act - *Qui Tam* Actions

Congress enacted the federal False Claims Act (“FCA”), 31 U.S.C. §§ 3729-3733, in 1863 due to concerns that private suppliers during the Civil War were defrauding the Army. The FCA, as amended, provides that any person who knowingly submits false claims to the federal government is subject to civil penalties and up to treble damages.

The FCA also prohibits retaliation against employees who engage in conduct protected under the law, including the bringing of FCA *qui tam* actions. § 3730(h).

The FCA has generated some of the most sensational whistleblower awards through its allowance of “*qui tam*” actions, most prominently in the healthcare industry. A *qui tam* complaint, in which the private individual is filing a claim as a “relator” for the federal government, must be filed with the court under seal, and must be served on the U.S. Attorney for the judicial district where the action was filed. The *qui tam* complaint is then sealed for 60 days for the government to investigate, and that period may be extended by request of the government. If the government decides to take over the action (“*intervenes*”), and prevails in obtaining a recovery, the relator is entitled to receive between 15 and 25 percent of the amount recovered, with certain exclusions. If the government declines to intervene, the relator then can proceed with private counsel and his or her share of any recovery increases to 25 to 30 percent. A successful *qui tam* relator also is entitled to recover from the defendant his or her legal fees and other expenses of the action.

Importantly, a relator cannot file or prevail on an FCA action if: (1) the relator was convicted of criminal conduct arising from his or her role in the FCA violation. § 3730(d)(3); (2) another *qui tam* concerning the same conduct already has been filed. § 3730(b)(5); (3) the government already is a party to a civil or administrative money proceeding concerning the same conduct. §3730(e)(3); or (4) the *qui tam* action is based upon information that has been disclosed to the public through governmental hearings, audits, reports, or investigations, or through the news media. § 3730(e)(4)(A).

B. Whistleblower Actions Handled Through OSHA

During the past 40 years, Congress has entrusted the Occupational Safety and Health Administration with adjudicating whistleblower claims under more than twenty laws. These laws, and the applicable time limit for filing a claim, include:

1. Asbestos Hazard Emergency Response Act (90 days)
2. Clean Air Act (30 days)
3. Comprehensive Environmental Response, Compensation and Liability Act (30 days)
4. Consumer Financial Protection Act of 2010 (180 days)
5. Consumer Product Safety Improvement Act (180 days)

6. Energy Reorganization Act (180 days)
7. Federal Railroad Safety Act (180 days)
8. Federal Water Pollution Control Act (30 days)
9. International Safe Container Act (60 days)
10. Moving Ahead for Progress in the 21st Century Act (motor vehicle safety) (180 days)
11. National Transit Systems Security Act (180 days)
12. Occupational Safety and Health Act (30 days)
13. Pipeline Safety Improvement Act (180 days)
14. Safe Drinking Water Act (30 days)
15. Sarbanes-Oxley Act (180 days)
16. Seaman's Protection Act (180 days)
17. Section 402 of the FDA Food Safety Modernization Act (180 days)
18. Section 1558 of the Affordable Care Act (180 days)
19. Solid Waste Disposal Act (30 days)
20. Surface Transportation Assistance Act (180 days)
21. Toxic Substances Control Act (30 days)
22. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (90 days)

Claims under most of these laws must proceed first through OSHA, with limited options for judicial review thereafter.

The whistleblower provisions of the Sarbanes-Oxley Act ("SOX") and the Dodd-Frank Wall Street Reform and Consumer Protection Act protect employees of publicly traded corporations and their affiliates who report violations of the Securities Exchange Act or any other federal law relating to fraud against shareholders. Whistleblower claims under SOX and Dodd-Frank are addressed in depth in related papers for this panel, and therefore are not further summarized here.

C. State Whistleblower Laws

Thirty-six states have whistleblower laws, most of which protect state employees only. Many of these statutes, however, also protect private employees and provide greater protection and a wider range of damages than federal laws. A survey of state whistleblower laws is available at the National Conference for State Legislatures website page on state whistleblower laws at <http://www.ncsl.org/research/labor-and-employment/state-whistleblower-laws.aspx>.

Upon first notice of a potential whistleblower claim, counsel for both employers and employees should consider whether state whistleblower laws apply, and their applicable procedures, protections, statutes of limitation, and remedies.

Examples of three state whistleblower laws:

1. California

California Govt. Code § 53296 et seq. applies to all employers and makes it unlawful for an employer to retaliate against an employee for disclosing information to a government or law enforcement agency, if the employee reasonably believes the information involves a violation of state or federal law. A claim must be reported to the State Division of Labor Standards Enforcement within 90 days of the alleged retaliatory conduct.

To be protected, the employee's disclosures must be based on the employee's reasonable belief that a violation of a public regulation or law occurred. Employees may not be retaliated against for disclosing information regarding a perceived violation. Cal. Lab. Code § 1102.5.

2. New Jersey

New Jersey's Conscientious Employee Protection Act ("CEPA") is one of the most far-reaching whistleblower statutes in the nation. It applies to all employers in New Jersey – public and private, regardless of size. Under CEPA, it is unlawful for an employer to take an adverse employment action against an employee who discloses, objects to, or refuses to participate in any action that the employee reasonably believes is in violation of the law (or a rule or regulation promulgated pursuant to law), criminal, fraudulent or in violation of a clear mandate of public policy.

A CEPA claim must be brought within one year of the alleged retaliatory action. The full panoply of relief and damages is available to a prevailing CEPA plaintiff, including injunctive relief, reinstatement, front pay and back pay, lost benefits, compensatory damages, punitive damages and attorneys' fees and costs.

3. Pennsylvania

Public employers and private organizations that receive state funds are covered by Pennsylvania's Whistleblower Law, which protects both employees and independent contractors. 43 Pa. Stat. Ann. § 1422.

Pennsylvania's law defines a whistleblower as "a person who witnesses or has evidence of wrongdoing or waste while employed and who makes a good-faith report of the wrongdoing or waste, verbally or in writing, to one of the person's superiors, to an agent of the employer or to an appropriate authority." 43 Pa. Stat. Ann. § 1422. The statute recognizes whistleblowing to include a report to the individual's superiors, an agent of the employer, or an appropriate governmental authority. 43 Pa. Stat. Ann. § 1422.

An employer may not discharge, discriminate or retaliate against an employee because the employee makes a good-faith report to the employer or appropriate authority about an instance involving wrongdoing or waste. 43 Pa. Stat. Ann. § 1423.

Under a recent amendment to Pennsylvania's law, an employer may take disciplinary action against a worker who submits a whistleblower complaint in bad faith, such as to harass or cause embarrassment to the employer. 43 Pa. Stat. Ann. § 1422.

Employees may pursue an action in court within 180 days after the alleged violation occurs and may seek injunctive relief or money damages, as well as attorneys' fees and costs. 43 Pa. Stat. Ann. §§ 1424-1425. At least one appellate court has found that there is no right to a jury trial for a Whistleblower Law violation. *See Bensinger v. Univ. of Pittsburgh Med. Ctr.*, 98 A.3d 672, 685 (Pa. Super. Ct. 2014).

III. Steps for Employers to Take Upon Notice of a Whistleblower Claim

This section sets forth key considerations and action items for defense counsel upon initial intake and involvement in the investigation and defense of a whistleblower claim.

A. Can You Hear the Whistle Blowing? Notice of a Claim

1. Internal complaint – oral or written
2. Anonymous hotline tip
3. Notice from governmental agency of complaint
4. Threat of legal action
5. Filing of a lawsuit

B. Maintain Confidentiality as Much as Feasible

1. If whistleblower still employed, protect against retaliation
2. Is garden leave or transfer of employee or target warranted?
3. Preserve causation defense -- a supervisor cannot retaliate, if he or she doesn't know of claim or claimant
4. Avoid rumor mill and spreading of claim – especially if baseless
5. Act quickly, carefully

C. Become an Immediate Expert in the Law at Issue

1. Counsel should immediately research the laws at issue

- a) This includes substantive law and employee protections
 - b) Determine whether statutes of limitation are at a threshold
 - c) Bring in expert counsel, as needed
2. Both federal and state laws should be considered
 3. Review common law defenses, nuances and issues beyond the statutes
 4. Use the law to help guide the investigation and defense

D. Determining the Seriousness of the Complaint

1. Does it involve a threat to public health or safety?
2. A violation of criminal law or fraud?
3. Are customers, clients or shareholders impacted or threatened?
4. At what level are the alleged wrongdoers?
5. Is the company's public image and goodwill at issue?
6. Is licensing at risk? Debarment?
7. Is this more in the nature of a personal grievance?
8. Is it a clearly mistaken understanding of the law, or the whistleblower applying his or her own personal standards?

E. Decide Who Will Investigate and How

1. Human resources (with privileged legal guidance)
2. Compliance director (with privileged legal guidance)
3. In-house counsel (with privileged guidance from outside counsel)
4. Independent investigator
 - a) Preferably one with whom counsel has experience or knowledge
 - b) Expertise and independence

- c) Determine level of communication (generally not privileged)
- 5. All should understand privilege limits at start
- 6. Goals include:
 - a) Strong, prompt investigation (with privileged guidance)
 - b) Rooting out and solving problems
 - c) Creating solid defense through prompt response
 - d) Ensuring investigator will be credible witness
- 7. Even if court complaint is first notice of issue, employer will still need to conduct and document investigation of claims

F. Conducting the investigation

- 1. Gathering documents – paper and electronic
 - a) Can you check into whistleblower’s e-files?
 - b) Yes, go big – review them for all witnesses
 - c) Litigation hold order may be appropriate
- 2. Instruct witnesses as to confidentiality, non-retaliation, role of investigator
- 3. Interviewing the alleged whistleblower
 - a) Knowledge of facts
 - b) Knowledge of law – most laws require some knowledge of law
 - c) Why no prior report of wrongdoing?
 - d) Is whistleblower culpable for alleged violations?
 - e) Ulterior motives? Credibility issues?
 - f) Prior discipline?
- 4. Interviewing other witnesses

5. Other sources of information
 - a) Gather evidence as to employer's compliance efforts
 - b) Gather evidence as to involvement by whistleblower, others in compliance and/or alleged wrongdoing
6. Documenting the investigation

G. Dealing with the whistleblower who has a compliance role

1. Is the whistleblower culpable?
2. Does the whistleblower law protect the employee?
 - a) First Amendment exception - *Garcetti*
 - b) Fair Labor Standards Act's "manager rule" -- *see, e.g., Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 628 (5th Cir. 2008)
3. Can compliance employee maintain his/her role during investigation/claim? Beware of retaliation

H. Conclusions of investigation

1. Report -- oral, then written (consider privilege issues)
2. Prompt remedial actions
 - a) Even if no wrongdoing found, look for proactive measures to make company better/safer/more law-abiding
 - b) Employee and management training
 - c) New policies
3. Report back to whistleblower
4. Governmental reporting due?

I. Assessing Whether to Litigate or Settle

1. Public interest v. private issue
2. Strength of claims and defenses
 - a) Key issue #1 – did plaintiff have reasonable belief that company’s actions violated the law
 - b) Key issue #2 – did the company’s actions *actually* violate the law
 - c) Key issue #3 – did the decision-maker know of plaintiff’s alleged protected conduct
 - d) Key issue #4 – magnitude of damages and potential fallout
3. Appeal and credibility of witnesses
4. Morality play – who wins?
 - a) Defense counsel should be striving from day one to gather evidence that places employer in superior moral position
 - b) Humanize the defense
5. Benefits of keeping claims out of the headlines and mitigating risk of governmental inquiry
 - a) Plaintiffs can take away leverage for settlement by publicly reporting their concerns before giving the company a chance to respond
 - b) Be sure problem is solved, or more claims will follow