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What Do I Do If There's A Whistleblower In Our Organization?

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TOPICS COVERED

- I. Numerous state and federal laws and regulations protect and encourage whistleblowing.
- II. False Claims Act, Sarbanes-Oxley, Dodd-Frank and the IRS Incentivize Whistleblowers.
- III. What limits are there on whistleblowers?
- IV. There is a whistleblower in your organization.
- V. Lawyers as whistleblowers.
- VI. Your take aways as in-house counsel.

- I. Numerous State and Federal Laws and Regulations Protect and Encourage Whistleblowing.
 - A. U.S. Department of Labor, as an example, administers over 20 laws containing provisions about whistleblowers; e.g. Affordable Care Act; Solid Waste Disposal Act; Clean Air Act. Most labor, public safety and many environmental laws mandate whistleblower protections for employees (and maybe others). [See handout, US DOL “desk reference”]
 - B. The U.S. Department of Labor through OSHA also investigates whistleblower complaints under the **Sarbanes-Oxley Act**. [The **Dodd-Frank** amendments to SOX provide that the SEC investigates whistleblower allegations made under that statute.]
 - Congress concluded that OSHA, a U.S. Department of Labor agency, had the expertise to investigate financial misconduct matters... OSHA also handles many other whistleblower allegations.
 - C. The **False Claims Act**, enacted when Abraham Lincoln was President, encourages whistleblowing to uncover fraud against the government.

The qui tam provisions allow “relators” to file actions on behalf of the federal government.

- A very broad statute covering everything from government contracts to Medicare to tax fraud.
 - At least 30 states have their own version of the False Claims Act.
- D. The IRS has a very extensive whistleblower program.
- The IRS recovered \$1.4 billion last year, of which \$300 million went to whistleblowers.
- E. Texas: Texas Whistleblower Act (Gov. Code Sec. 554.001 *et. seq.*) protects Texas public employee whistleblowers. Texas Medical Fraud Prevention Act (Tex. Hum. Res. Code Sec. 36.001 *et. seq.*) encourages whistleblowing in the state Medicaid program. Similar statutes protect whistleblowing under statutes regulating workers compensation, employment discrimination, health care employees, etc.
- Texas lacks a comprehensive whistleblowing law applicable to private sector employees generally.

- *Texas common law protects employees terminated for refusing to perform illegal act. Sabine Pilot Serv. v. Hauck, 687 S.W. 2nd 733 (Tex. 1985) allowed an at-will worker to sue for refusal to follow an illegal order.*
- *The Sabine Pilot whistleblowing exception to the at-will doctrine is fairly narrowly construed. See Peine v. HIT Services L.P., 479 S.W. 3rd 445 (Tex. App. Houston 2015) (rejecting employee whistleblower's claim that he was fired in retaliation for refusing to perform illegal act, as he had violated a confidentiality clause). This case, if filed under federal law, might have survived.*

F. All of these statutes have one thing in common: whistleblowers are protected from retaliation in the employment setting.

II. False Claims Act, Sarbanes-Oxley, Dodd-Frank and the IRS Incentivize Whistleblowers.

- A. The False Claims Act is the progeny for the concept of giving whistleblowers a piece of the pie.
- The False Claims Act (“Lincoln’s Law”) was intended to root out corruption in government contracting during the Civil War.
 - The *qui tam* concept traces its origin to the Middle Ages. Rewards were offered by English kings to “common informers” that reported fraud.
 - The False Claims Act allows relators to recover 15-30% of the value of recovered funds.
 - Broad whistleblower protections under Sec. 3730(h) of the False Claims Act provide reinstatement, double back pay and attorneys’ fees.
 - False Claims Act claims have increased over recent years while expanding beyond government defense contracting and healthcare fraud.
 - *The U.S. Department of Justice investigates complaints and can intervene, do nothing, or move to dismiss a relator’s claim.*

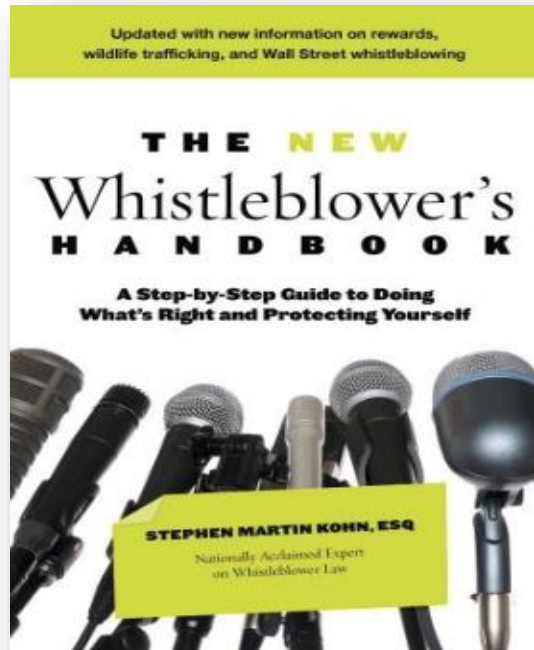
- *Recently, some courts and Congress have been critical of U.S. Department of Justice efforts to dismiss False Claims Act qui tam actions. (AG Barr questioned extensively at his confirmation hearing.) See also, references to the “King of Qui Tam” (attorney Stephen B. Diamond) noting fewer tax fraud settlements.*
<https://mcdonaldhopkins.com/Insights/Blog/Tax-and-Benefits-Challenges/2018/02/15/Illinois-Prolific-tax-whistleblower>

B. Sarbanes-Oxley and Dodd-Frank have upped the ante on bounty claims.

1. Sarbanes-Oxley Act (passed in 2002) implemented sweeping reforms of financial institutions, influenced by several corporate criminal scandals.
 - Congress specifically recognized that regulating agencies lacked the ability to police misconduct; therefore, generous whistleblower protections were enacted for employees reporting fraud in financial reporting implicating the securities laws.
 - Whistleblower bounties or incentives were not included, however, under Sarbanes-Oxley.
 - Lawyers working for public companies are obligated to report securities laws violations to the CEO.

- While Sarbanes-Oxley changed how public companies make financial reports, many whistleblower claims failed and SOX did not live up to its promise. Why?
2. Dodd-Frank (passed in 2010) likewise was in response to a crisis – the 2007-2008 financial crisis. It is more sweeping in scope than Sarbanes-Oxley affecting the FDIC and related products, payments and bank clearings, agencies such as CFTC, SEC, derivatives and swaps, just to name a few.
- Taking the Sarbanes-Oxley lessons that whistleblowers had a hard time making claims and only limited fraud was reported, Sec. 922 of Dodd-Frank required the SEC to establish a new whistleblower program that paid awards to persons who voluntarily provided the SEC with original information about a violation of securities laws; however, to be a protected whistleblower, you must make a claim with the SEC. *Digital Realty Trust v. Somers*, 583 U.S. ____ (2018)
 - The SEC has also determined that whistleblowers can report to the SEC, or, internally and the SEC, or simply assist the SEC with investigations and still gain a bounty. And, the SEC kept control of investigations of these claims.
 - Dodd-Frank dramatically expanded the statute of limitations to make claims as well as protecting whistleblowers.

- The SEC has gone as far as to take action against companies requiring employees to sign confidentiality agreements that would impede reporting violations. *In the Matter of KBR, Inc.*, File No. 3-16466 (Release No. 74619, April 1, 2015).
<https://www.sec.gov/litigation/admin/2015/34-74619.pdf>
- The bounty paid on successful claims is 10% - 30%.



NWC Article on Whistleblower Rewards Featured by Regulatory Review.

“Whistleblowing is a Key Regulatory Tool,” by former NWC Legal Fellow Aaron Jordan was featured in Regulatory Review’s Year in Review Series.

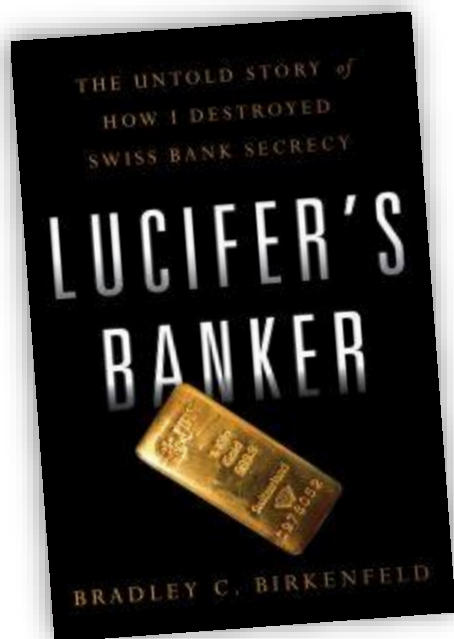
Wells Fargo Whistle-Blower Wins \$5.4 Million and His Job Back.



Life is getting better for those who expose wrongdoing, but companies continue to fight back—often against their own interests.

C. Internal Revenue Code

- The IRS started its whistleblower incentive program in 2007. Since then, the IRS collected over \$5 billion and paid out over \$800 million in incentive payments to individuals reporting tax fraud.



Lucifer's Banker

The Untold Story of How I Destroyed Swiss Bank Secrecy

His bombshell revelations helped the US Treasury recover over \$20 billion (and counting) in back taxes, fines and penalties from American tax cheats. But Birkenfeld was shocked to discover that at the same time he was cooperating with the US Government, the Department of Justice was still doggedly pursuing him. He was arrested, pled guilty, and served thirty months in federal prison. When he emerged, the Internal Revenue Service gave him a whistle-blower award for \$104 million, the largest such reward in history.

III. What limits are there on whistleblowers?

- A. Generally speaking, Sarbanes-Oxley/Dodd-Frank do not at least initially require a whistleblower to self-identify. Anonymous persons must have a lawyer submit the claim. Other statutes and agencies also often allow anonymous complaints.
- B. Employees are generally protected. What about agents or contractors?
 - Contractors not protected under Sarbanes-Oxley. *Lawson v. LMR LLC*, 571 U.S. ____ (2014) (case arising before Dodd-Frank). However, “any person” can gain protections under Dodd-Frank whistleblower laws.
- C. Standard of proof: You don’t need to report an actual or probable violation of law under Sarbanes-Oxley/Dodd-Frank; reporting a possible violation based on a reasonable belief gives you protection.
- D. Generally cannot recover an award if the whistleblower committed illegal acts. However, this is not necessarily true with IRS whistleblowers.

E. Self-help and its complications.

- The land is changing here. Smart plaintiff's lawyers advise caution but the law is trending in favor of self-help.
- Sarbanes-Oxley and Dodd-Frank ban companies from using confidentiality agreements to prohibit reporting to SEC.
- *Erhart v. Bofi Holdings*, 2017 U.S. Dist. LEXIS 20959, (S.D. Cal. Feb. 14, 2017) held that the public policy favoring whistleblowers to root out fraud outweighed enforcement of confidentiality agreements or other statutes that might be implicated by using purloined documents.
- Whistleblowers use Anti-SLAPP statutes to preempt attempts to cut off their claims. (SLAPP = Strategic Lawsuits Against Public Participation). (See Texas Citizens Participation Act.)

F. Secret Recordings.

IV. There Is A Whistleblower In Your Organization.

A. How do you know?

- Sometimes your first inkling is the agency investigative demand or letter.
- Sometimes the whistleblower makes an internal complaint.
- Often, someone tells you – I think there's a whistleblower here.

B. Internal self-reporting by a whistleblower.

- Retaliation compounds your potential issues.
- DO NOT identify the person to everyone. *See Haliburton v. Admin. Rev. Bd.*, 771 F.3d 254 (5th Cir. 2014) (employee outed by document preservation notice, who later resigned, suffered retaliation under Sarbanes-Oxley).
- Changes in job duties, computer or record access, reporting assignments or job duties must pass a very high threshold to avoid a retaliation finding; do normal things (job evaluations, pay raises, discipline).
- Less visible actions can be the basis for retaliation (ostracizing, failure to include, avoidance).

- If you have an investigative process, use it and use it just as you would in similar situations.
- Assess whether the allegations might implicate legal reporting obligations by the business.
- Make sure legal advice is given by lawyers under privilege about risks.
- If lawyer investigation is needed, be sure to keep a separate privileged channel for lawyers giving advice. Facts are not privileged by advice but advice is privileged.
- Be sure all managers dealing with the individual understand your ground rules for dealing with daily issues.

C. Anonymous Reporting.

- Can arise in many ways (letters, internal complaint process, agency notice or demand).
- Resist the temptation to start digging and speculating; be sure managers who may be involved know it is not their job to be detective.

- Keep things normal wherever justified and possible.
- There can be issues with anonymous reporting such as inability to conclude an investigation or lack of closure.

D. Lawyer Involvement.

- It is unusual for a whistleblower to directly involve a lawyer in a complaint.
- Lawyers attending interviews of a whistleblower.
- The most likely scenario is a lawyer sending a demand letter threatening to file a whistleblower retaliation claim (or possibly, to initiate an agency investigation) unless you pay money to resolve the matter.

V. Attorney Whistleblowers.

- A. Sarbanes-Oxley creates a duty for attorneys to report securities law issues to the CEO. Attorneys “appearing and practicing before” the SEC have an ethical obligation to make an internal report of any credible evidence that it is “reasonably likely that a material violation” of federal securities law has occurred, is ongoing, or about to occur. 17 C.F.R. § 205.2; Sarbanes Oxley Act of 2002 § 307.
- In-house attorneys are a significant source of whistleblowing complaints but many hit snags. *See, e.g., U.S. ex. Rel. “Fair Laboratory Practices” v. Quest Diagnostics, Inc.*, 734 F. 3d 154 (2d Cir. 2013) (in-house counsel violated ethics rules by attempted whistleblowing on former client).
- B. Attorney “self help” is hemmed in potentially by attorney-client privilege and state ethics rules.

- C. SEC denies whistleblower protection to lawyers who attempt to disclose attorney-client privileged information or information learned in the course of representation unless the disclosure is permitted by state ethics rules or permitted by 17 CFR 205.3(d)(2). See 17 CFR 240.21F-4(b)(4).
- The ABA Model Rules allow for attorneys to disclose confidential client information to prevent a crime or make inaccurate representations that further a crime or fraud Rule 1.6(b)(2) and (3).
 - Texas ethics rules generally follow the same approach. See Texas Disciplinary Rules of Professional Conduct Rule 1.05 (7) and (8).

VI. Take Aways From This Presentation.

- A. There are many whistleblower statutes giving protection to whistleblowers.
- B. The government relies heavily on whistleblowers to initiate enforcement actions. Hence, the incentives.
- C. It is easy to retaliate against a whistleblower, even if the underlying claim is not substantiated.
- D. All systems normal: the easiest way to create issues is to change existing practices or norms or procedures.
- E. If it is possible, a thorough investigation by competent persons can help determine if there are merits to the claim and identify those instances where the complaint may be a smokescreen.
- F. Treat all whistleblowers with respect. Many deserve their opportunity to report and allow you to do the right thing.

QUESTIONS?

