

Cutting Edge Issues in Whistleblower Investigations by Government Contractors



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Outline

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- Special Whistleblower Issues for Government Contractors
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 - Implications for Employment and Separation Agreements
- Cutting Edge Issues in Whistleblower Investigations
 - Gatekeepers as Whistleblowers
 - Forensic Investigations
 - Whistleblower Self-Help Discovery (Including Government Data)

Introduction

The Profile of the “Typical” Whistleblower Changing

- Traditional whistleblower: Disgruntled line employee raising discrimination complaints to gain job protection
- Studies suggest that whistleblowers now tend to be:
 - Male
 - More highly educated
 - Skilled and/or supervisory employees
 - Either new employees (less than 2 years) or near-retirement
 - In a position to have access to information (e.g., IA, Compliance, GCs office, Finance)
- Vast majority complain internally first

Important to Know Your Whistleblower

- “Private Attorney General”
 - Seeks to “right the ship”
 - Attempting to protect the company, employees and shareholders
- Opportunistic or disgruntled employee
 - “Sees the writing on the wall”
 - Seeks leverage
 - Seeks recognition or influence
 - Seeks money (retaliation claim and/or bounty)
- “The best defense is a good offense”
 - Attempt to avoid the consequences of his or her own misconduct
 - Divert attention from other problematic conduct

Whistleblower Protections

Expanding Alphabet Soup of Claims and Rewards

Retaliation Claims

Title VII and Other EEO Claims
FLSA and FMLA
SOX and Dodd-Frank
FCA Retaliation
NDAA Whistleblower Protections
OFCCP Anti-Retaliation Provisions
Other Retaliation Claims
Administered by OSHA (20+)

Qui Tam and Bounty

SEC Whistleblower Reward Program
CFTC Whistleblower Reward Program
IRS Tax Fraud Whistleblower Reward
FCA Qui Tam

Government Contracts Law

- Several sources of whistleblower protections under government contracts law:
 - Direct whistleblower protection statutes;
 - Anti-retaliation provisions of the False Claims Act;
 - Federal Acquisition Regulations clauses;
 - Agency-specific contract clauses;
 - Agency Inspector General enforcement;

Whistleblower Protection Statutes

- NDAA Whistleblower Protection Law:
 - 10 U.S.C. § 2409 (Department of Defense and NASA)
 - 41 U.S.C. § 4712 (civilian agencies)
 - * Intelligence Agency whistleblowers follow the whistleblower provisions of the Intelligence Authorization Act (50 U.S.C. § 3033)
 - reports or information are to be provided to the IG.

Whistleblower Protection Statutes (cont)

- Prohibition on Retaliation:
 - Employee of a contractor or grantee may not be terminated, demoted, or otherwise retaliated against for disclosing – to a qualifying “person or body” – information that the individual reasonably believes to be evidence of:
 - Gross mismanagement of a contract or grant;
 - A gross waste of Federal funds;
 - An abuse of authority relating to a Federal contract or grant;
 - A substantial and specific danger to public health or safety; or
 - A violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant

Whistleblower Protection Statutes (cont)

- Qualifying persons or bodies for reporting are:
 - A Member of Congress or a representative of a committee of Congress;
 - An Inspector General;
 - The Government Accountability Office;
 - A Federal employee responsible for contract or grant oversight or management at the relevant agency;
 - An authorized official of the Department of Justice or other law enforcement agency;
 - A court or grand jury; and
 - A management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct.

Whistleblower Protection Statutes (cont)

- Retaliation complaints may be submitted to the agency IG, who is required to investigate (unless a determination is made within 180 days that the complaint is frivolous);
- At the conclusion of the investigation, the IG is required to submit a report to the person, the contractor, and the agency head.

Whistleblower Protection Statutes (cont)

- If retaliation is found, the agency head may order remedies, including the following:
 - Ordering the contractor to take affirmative action to abate the reprisal;
 - Ordering the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken; or
 - Order the contractor or grantee to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.
- Once administrative remedies have been exhausted, the whistleblower may bring an action in federal court.

“Contributing Factor” Burden of Proof

- In order to demonstrate retaliation, the employee must show that the whistleblowing activity was a “contributing factor” in the employment action – may be demonstrated by showing that:
 - The official taking the personnel action knew of the whistleblowing; and
 - The timing of the personnel action was such that a reasonable person would conclude that the whistleblowing was a contributing factor.
- The contractor may rebut this showing by clear and convincing evidence that it would have taken the same personnel action regardless of the whistleblowing activity.

FAR Clauses

- FAR 52.203-17 - Contractor Employee Whistleblower Rights and Requirement To Inform Employees of Whistleblower Rights:
 - Makes the rights and remedies under the NDAA Whistleblower Protection Law applicable to the contract;
 - Requires the contractor to provide written notice, in the predominant language of the workforce, of those rights and remedies;
 - Requires flowdown in contracts over the simplified acquisition threshold.

FAR Clauses (cont)

- FAR 52.203-18/52.203-19 – Provisions Regarding Entities that Require Certain Internal Confidentiality Agreements or Statements:
 - Agencies are prohibited from using appropriated funds in a contract with an entity that requires employees or subcontractors to sign confidentiality agreements that restrict their ability to report waste, fraud, or abuse;
 - By submitting an offer, the contractor represents that it will not engage require employees or subcontractors to sign such agreements;
 - * This may well serve as a predicate for a False Claims Act action if violated.

FAR Clauses (cont)

- Contractors are likewise prohibited by contract from requiring such a confidentiality agreement;
- “Internal confidentiality agreement or statement” does not include confidentiality agreements arising out of civil litigation or confidentiality agreements that contractor employees or subcontractors sign at the behest of a Federal agency;
- Contractors are required to notify employees that existing confidentiality provisions that are inconsistent with the clause are no longer in effect; and
- Contractors are required to flow 52.203-19 down to their subcontractors.

Consequences for Contractors That Violate Whistleblower Protections

- Whistleblower remedies under the statutes;
- Withholding of payment
- Termination for default;
- Suspension and debarment;
- Investigations and audits.

False Claims Act

- The FCA prohibits conduct involving fraud on the government.
 - *False claims provision* creates liability for knowingly presenting or causing to be presented a false or fraudulent claim for payment. 31 U.S.C. § 3729(a)(1)(A)
 - *False statement provision* creates liability for knowingly making, using, or causing to be made or used, a false record or statement **material** to a false or fraudulent claim. 31 U.S.C. § 3729(a)(1)(B)
- A company may be liable if it submits a claim to the government, or if it causes a false claim to be presented or made

False Claims Act By the Numbers

- In 2018, FCA recoveries by DOJ totaled \$2.8 billion.
 - \$2.1 billion came from settlements and judgments in qui tam matters.
- In 2017, FCA recoveries by DOJ totaled over \$3.4 billion.
 - \$3.1 billion came from settlements and judgments in qui tam matters.
- In 2016, FCA recoveries by DOJ totaled over \$4.9 billion.
 - \$3 billion came from settlements and judgments in qui tam matters.

Anti-Retaliation Provisions of the FCA

- According to the FCA's anti-retaliation provision, an employee is entitled to relief if she is "discharged, demoted, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts" taken to further an FCA action **or** to stop a false claim. 31 U.S.C. § 3730(h)(1)
- Such relief **shall** include "reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees." 31 U.S.C. § 3730(h)(2)

Scope of FCA Whistleblower Protection

- The FCA's whistleblower retaliation provisions apply to employees, contractors, or agents who engage in lawful acts in further of an action under the FCA, or in other efforts to stop a violation of the FCA.
- So who can bring an action for retaliation?
 - Whistleblower
 - Anyone helping the whistleblower
 - Anyone working with the government "in further of" an FCA action

Parallel Proceedings

- What are parallel proceedings?
 - Investigations or litigation arising from the same set of facts
 - Can be initiated by criminal, civil, administrative authorities, and/or private parties.
- Who can bring civil actions under the FCA?
 - Government and private citizens.
 - When it is a private party, they are referred to as the relator or qui tam plaintiff
 - Financial incentive for relator, as they may receive up to 30% of any recovery

FAR Mandatory Disclosure Rule

- The FAR MDR requires timely disclosure to the DOD-IG, with a copy to the appropriate Contracting Officer, when the Contractor has credible evidence that a principal, employee, agent or subcontractor has committed:
 - A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the USC, or
 - A violation of the civil False Claims Act
- Knowing failures to disclose could result in suspension or debarment.

Contractor Employment and Separation Agreements

- Example employment agreement language:

Employee agrees that he or she will not make, or cause to be made, any derogatory, disparaging, negative, critical, or defamatory statements, either orally or in writing, about the company to anyone, including without limitation, the company's current, former, or prospective employees, donors, funding agencies, contractors, subcontractors, consultants, program partners, officials of any government, the press or any other media.

Contractor Employment and Separation Agreements (cont)

- Example severance agreement language:

Employee agrees that he or she will not disclose any confidential or proprietary information regarding the company to any competitor of the company and will not disparage the company to any customer or vendor of the company.

Contractor Employment and Separation Agreements (cont)

- “Savings” language:

The foregoing shall not in any way limit the individual’s ability to disclose information to any government regulatory authority or make any other communication that is protected by law or regulation.

Gatekeepers as Whistleblowers

The “Stand Up” Requirement

- Gatekeepers, like attorneys, accountants and compliance personnel, responsible for identifying and remedying fraud and compliance gaps
- When can a gatekeeper become a whistleblower if “blowing the whistle” is part of his or her job duties?
- Traditionally, courts have required gatekeepers to “stand up” and do something beyond their job duties to notify employers that they are lodging a complaint
- Courts split in the Title VII and EEO context. See *DeMasters v. Carilion Clinic* (4th Cir. 2015)
- More explicit standards for federal whistleblower claims, like SOX and SEC Bounty proceedings

Attorney Gatekeepers as Whistleblowers

- Can they disclose or use privileged and confidential information in reporting fraud? In pursuing qui tam or retaliation actions?
- Subject to the restrictions of state ethics rules
- Most state require disclosures in the case of ongoing crime or fraud
- But, standards vary significantly
 - California: Can only disclose if reasonably believe necessary to prevent death or substantial bodily harm
 - New Jersey: Organization they represent may suffer substantial harm because of unlawful conduct of leadership

Under FCA, Results May Turn on State Ethics Rules

- *U.S. v. Quest Diagnostics* (2d Cir. 2013): Former general counsel violated New York rule of professional conduct prohibiting use of confidential information by filing as relator in qui tam action
- *U.S. v. Northrup Grumman* (5th Cir. 2016): District Court did not abuse discretion in disqualifying attorney from serving as relator in qui tam action because he violated no less than four ethical duties by using confidential documents from arbitration proceeding
- *Stein v. Tri-City Healthcare District* (S.D. Cal. Dec., 5, 2014): ruling in FCA **retaliation** action “[a]lthough Plaintiff may not divulge the actual substance of his conversations during which legal advice was given to Tri-City, Plaintiff may testify generally about how he carried out his duties regarding giving compliance advice”

The SEC Has Tried to Re-Write the Rules

- Rules for attorney disclosures in Part 205
- Applies to attorneys who appear or practice before SEC
- States that it **supplements and supersedes** state ethics rules
- Must report evidence of “material violation” to CLO, who must investigate and provide status
- If CLO fails to take appropriate response in reasonable amount of time, must report to BOD or committee of Board

The SEC Has Tried to Re-Write the Rules

- Part 205 does not require attorney to “report out” material violations to SEC
- Any attorney **may** disclose confidential information to:
 - Prevent material violation that would cause substantial injury
 - Prevent perjury or fraud on the Commission
 - Rectify material violation that caused substantial injury
- Exceptions conflict with ethical rules of many jurisdictions
- Some jurisdictions have raised challenges to SEC’s authority to permit reporting out
- Because creates a COI, counsel cannot recover bounty if information obtained through protected communication, unless permissible exception by Part 205 or state ethics rules

Conducting Forensic Investigations

Forensic Inspections Are An Essential Step

- Part of the preservation obligations of employer, whistleblower and key witnesses
- Acquisition of data
 - Computers - Encryption
 - Cell Phones – Passcodes/BYOD
 - Email
 - Logs
 - Internet traffic
 - Phone systems (i.e. VOIP)
 - Social media and cloud accounts

Forensic Investigations Are An Essential Step

- Investigation of data
 - Identify Data Exfiltration Possibilities (USB, Cloud, Email)
 - Extract Internet History
 - Identify files that have been opened, printed, copied
 - Review for communications (messaging, email, social media)
 - Review for data destruction
 - Investigation of Social Media Platforms

Investigating the Whistleblower

- From day one, employers should consider the claims and defenses they may have available
- All too often claimants:
 - Participate in or create the fraud about which they are complaining
 - Engage in self-help discovery
 - Spoliate evidence
 - Engage in other misconduct, such as competitive activity, that provides a defense
 - Refuse to cooperate in investigations
 - Manipulate witnesses

Investigating the Whistleblower

- As you are investigating the claimant's allegations, also should consider investigating his or her own conduct and motives
 - Determine his or her role in and knowledge of the alleged fraud or violation
 - Review responses to COC questionnaires
 - Conduct forensic review of computers, devices and accounts, including personal devices (if permitted by policy and state law)
 - Ask witnesses (including the claimant) about removal and spoliation of evidence and other misconduct
- Focus on potential improper motives, including performance status
- Consider conducting background checks and review social media

Self-Help Discovery by Putative Whistleblowers

Introduction

- Does protected activity include self-help or informal discovery, including
 - Taking documents?
 - Downloading data?
 - Uploading data to cloud?
- When and how can an employer control or discipline the employee's conduct and what impact can it have on litigation?
- The scary truth:
 - Almost every complainant engages in this conduct - from retaining selected employment-related documents to imaging entire hard drives and databases
 - Their counsel, unaware of the limitations, encourage and participate in this conduct

Limitations On Self-Help Discovery

- Complainant may have the right to engage in lawful and reasonable efforts to collect information and evidence supporting his claims
- But:
 - Must be undertaken for legitimate investigative purposes
 - Must have right to access the document or data
 - May not violate company policy or the law
 - May not disclose confidential information to third parties (other than counsel, potentially)
 - May not interfere with job duties or performance

Limitations on Self-Help Discovery

- Courts balance the employee's right to develop evidence in support of his claim with the employer's right to maintain confidentiality and control its workforce
- May also be allowable if "sole purpose" is to support a complaint or report to a government agency
- Must be mindful of SEC and other agency rules, which prohibit using confidentiality agreements to restrict employees right to provide information relating to violations

Preventing and Detecting Self-Help Discovery

Self-Help Tactic	Detecting	Preventing
Copy Data to Removable Media	Software Policies/Forensic Exam	Utilize Encryption/Prevent the use of removable media with policies, Sandbox utilization
Forwarding of data through Corporate Email	Logging email and alerts	Email Encryption, Limit Recipient Domains
Use of Personal Email to send data	Logging internet traffic and alerts	Prevent inadvisable domains (i.e. Gmail, Yahoo, etc...)
User of Cloud systems to transfer data	Logging internet traffic and alerts	Prevent inadvisable domains (Dropbox, Evernote, etc...), limit administrative access of computers

Preventing and Detecting Self-Help Discovery

Self-Help Tactic	Detecting	Preventing
Backups of Data (phones, computers)	Software Policies/Forensic Exam	MDM, Encryption
Old School (Printing, taking pictures)	Logging computer activities (i.e. printing) and alerts	Limit Print capabilities, limit cameras in sensitive areas

BYOD Policies: An Invitation for Self-Help Discovery

- Smart Phones
 - Organizational access (Documents, Email, Messaging, Voice)
 - Sending Data (Google Drive, Apple Air Drop, Printing)
 - Backups
 - Who owns access account (i.e. Apple ID)?
 - MDM – Should be in place, however, it is not fool proof
- Computers
 - Sandbox/Remote Desktop
 - Encryption
 - May not prevent all types of self-discovery

Cutting Edge Issues in Whistleblower Investigations by Government Contractors

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