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How to Handle Whistleblower Claims and Try to Avoid a Retaliation Lawsuit

by Erin Denniston

It is not uncommon for employees in the workplace to complain about their hours, their pay, or how they are treated by their supervisor or co-workers or the safety standards at their workplace (or lack thereof). So when do workers expressing workplace gripes turn into whistleblowers and how should an employer address such situations? This is a key issue with which employers are currently faced and which they should address head-on.

The number of retaliation claims continues to rise as do the protections and rewards provided to employees who act as whistleblowers. For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), whose final rules took effect in August 2011, created monetary awards for whistleblowers who provide original information to the Securities and Exchange Commission or Commodity Futures Trading Commission regarding corporate fraud or misconduct, strengthened the whistleblower protection provisions already in place in the Sarbanes-Oxley Act and the False Claims Act and created additional whistleblower retaliation causes of action. This is the first program that was created to incentivize employees to blow the whistle on corporate fraud and misconduct. Further, despite the fact that the Dodd-Frank Act monetarily incentivizes employees to blow the whistle, completely absent from the Act is any requirement that the whistleblower must first report initial findings through a company's internal compliance program. The Sarbanes-Oxley Act, the Occupational Safety and Health Act, the False Claims Act, the Dodd-Frank Act and a myriad of other federal and state laws provide a network of protections for whistleblowers who lodge complaints regarding everything from age discrimination to wage and hour violations to corporate and securities fraud and misconduct. In fiscal year 2011, 37.4 percent of the charges filed with the EEOC contained retaliation claims. This is up from approximately 27 percent in fiscal year 2002. Thus, it is important to understand how to handle and avoid costly retaliation claims.

What is a Whistleblower?

A whistleblower can be generally defined as a person who tells the public, a government agency or an authority figure about alleged dishonest or illegal activities occurring in a company whether it is violation of a law, rule, or regulation or a direct threat to public interest, such as fraud or health/safety violations. A whistleblower may make their claim internally within the company or externally like to law enforcement agencies, regulators or the media. However, whether an employee is deemed a whistleblower or simply a complainer, a company still must be careful in its treatment of that employee once a complaint of alleged dishonest or illegal activities has been raised.

What Laws Protect Whistleblowers?

Based on the key role employees play in exposing financial fraud, threats to public health and safety, fraud on the government, discrimination and wage-hour abuses, numerous whistleblower protection and retaliation prevention laws have been enacted. For example, the False Claims Act and the Sarbanes-Oxley Act protect whistleblowers who report a false claim against the federal government and corporate fraud, respectively. The Sarbanes-Oxley Act in fact imposes criminal penalties for retaliation against whistleblowers. The Dodd-Frank Act includes three new whistleblower retaliation causes of action and strengthens the prior whistleblower retaliation provisions. In addition, as set forth above, it created a program to monetarily incentivize employees with inside knowledge to come forward and blow the whistle. Specifically, it created a program within the SEC to encourage employees to report securities violations and created rewards of up to 30 percent of the funds recovered for information provided and ensured a minimum award amount of 10 percent for tips that lead to successful enforcement actions with sanctions of \$1 million or more. According to Senate Report 111-176, whistleblower tips identified 54.1 percent of uncovered fraud schemes in public companies while external auditors, including the SEC, only detected 4.1 percent of uncovered fraud schemes. The Occupational Safety and Health Act (OSH Act) protects employees from retaliation who have exercised any right afforded by the OSH Act, such as complaining to the employer union, OSHA, or any government agency about workplace safety or health hazards or participating in OSHA inspection conferences. Further, Title VII and the Fair Labor Standards Act contain anti-retaliation provisions that prohibit retaliation against employees for making or participating in discrimination complaints or opposing discrimination and/or making a wage-hour complaint or opposing unlawful wage-hour practices. In addition, several states have their own statutes prohibiting retaliation for making or participating in certain complaints or opposing certain conduct. Further, there is a common law wrongful discharge tort that further expands claims that an employee can make against their employer for alleged retaliation.

What is Retaliation?

Generally, unlawful retaliation occurs when an employer treats an employee adversely for exercising rights under one or more of the various federal or state statutes referenced above. To prove unlawful retaliation, an employee is required to establish that (1) the employee engaged in a protected activity

pursuant to that statute; (2) the employer took some adverse employment action against the employee; and (3) a casual connection existed between the protected activity and the adverse employment action. To establish that an employee engaged in a protected activity, an employee must show that he or she actually (a) participated in an activity protected by law (such as filing a charge of discrimination, testifying in support of another employee, or participating in an investigation) or (b) opposed an unlawful practice. A common example of retaliation is when an employee files an EEOC charge of discrimination against his/her supervisor and soon thereafter is terminated by that supervisor for filing the discrimination charge because the supervisor did not want to have to work with that employee anymore. The law requires that the supervisor treat the subordinate employee as if nothing happened and no discrimination charge was ever filed. Any form of adverse employment taken against an employee *because* he/she has engaged in protected activity constitutes retaliation.

How Can Employers Protect Themselves? The Best Defense is a Good Offense

First and foremost, employers should be vigilant in assessing their workplace and confirm that they are in compliance with the law.

Second, employers should prepare and disseminate to every employee a written internal procedure for filing a complaint. Employers should already have anti-discrimination and harassment policies in place but should also have a policy in place setting forth how employees can bring complaints to the employer outside of the discrimination and harassment realm. These policies should also include a non-retaliation statement that encourages employees to come forward with complaints of unlawful conduct without fear of reprisal. Along these same lines, employers should train supervisors on what constitutes retaliation and how to avoid treating employees differently.

Third, any time a claim of unlawful conduct is raised, an employer should conduct a thorough and unbiased investigation and should remind all employees involved in the investigation of the company's no retaliation policy. Employees who bring the claim should not be ignored or ostracized, and they should be kept informed of the status of the investigation. Further, the employer should offer the complaining employee continued assistance if the employee experiences additional problems or believes that he/she is experiencing problems as a result of making his/her complaint.

Fourth, an employer should properly document complaints and the investigation of the complaints. Documentation should include when the complaint occurred and when the supervisor became aware of the complaint, who was involved, what the complaint entails, who was talked to as part of the investigation and what the result of the investigation was. Upon completing the investigation, the employer should document the findings and, if necessary, make the proper adjustments and/or take appropriate disciplinary measures.

Fifth, employers' general practice should be to thoroughly document all employee performance issues. This way, an employer can demonstrate that any subsequent performance problems regarding a complaining employee or potential termination are justified and not as a result of alleged retaliation.

Conclusion

While continuing to employ and work with an employee that has made a complaint or who is deemed a whistleblower can sometimes be difficult, especially when that employee is believed to be a “problem employee” or the employee’s claim has no merit, employers need to be aware that internal complaints as well as external complaints can be protected by a variety of laws and the complainers may not be retaliated against because of their complaints. By consistently following written grievance procedures and policies, having clear policies in place and conducting thorough and unbiased investigations, employers can effectively reduce the risks of retaliation and whistleblower claims.

Following up on last month's Workplace Word article: [Background Checks and the Pitfalls Employers Face](#), the Federal Trade Commission (FTC), which is responsible for enforcing the Fair Credit Reporting Act (FCRA), recently warned the marketers of mobile phone applications (apps) that provide background reports that their apps may violate the FCRA if they are used for employment screening. The FTC confirmed what we already believed to be the case: that if the marketers of these apps have reason to believe that the background reports they provide are used for employment screening, they, as well as their users, could be in violation of the FCRA. The letters also warned these companies that a disclaimer telling customers that the reports should not be used for employment purposes would not act as a safe harbor for these companies.

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