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Whistleblowers Gain Enhanced Protection

EXPERT ADVICE NEEDED TO HANDLE 'PROTECTED' DISGRUNTLED WORKERS

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On Nov. 15, 2011, the Securities and Exchange Commission reported its newly established whistleblower program has generated hundreds of tips in the first seven weeks of its existence, and that dozens of enforcement actions had been opened.

Corporations should take note that the landscape has now shifted significantly, and that a "culture of whistleblowing" is taking shape. Employers will therefore need to pay careful attention to the new rules affecting whistleblowers, including, in particular, the expanded protection against retaliation, and consider whether their policies and compliance procedures for investigating misconduct, conducting internal investigations, and protecting against retaliation, are adequately tailored

to the new rules.

The SEC's Whistleblower Program, enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, pays awards to eligible whistleblowers who provide original information regarding securities law violations that enable the SEC to bring a successful enforcement action resulting in monetary sanctions over \$1 million. The whistleblower program allows for anonymous submissions, and provides that individual identities need only be revealed if required by court proceedings or to further an investigation. A whistleblower must reveal his or her identity to the SEC, however, in order to claim an award.

To qualify as a whistleblower, an individual or group of individuals need only provide information regarding possible violations of the federal securities laws. To be entitled to protection from retaliation, the whistleblower must have a "reason-



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able belief" that the information relates to a possible securities law violation, regardless of whether the whistleblower qualifies for an award.

Retaliation Prohibited

Employers may not take any negative action against a whistleblower for providing information to the SEC pursuant to the rules; assisting in an SEC investigation or action based on such information; or making disclosures that are required or protected under the whistleblower rules, the Sarbanes-Oxley Act (SOX) or any other law or regulation subject to SEC jurisdiction.

Critical to note, reports that are required or protected under SEC laws, SOX or other applicable laws or regulations, will afford anti-retaliation protection even if not reported directly to the SEC, and irrespective of whether the whistleblower satisfies the requirements for a reward. Potential prohibited retaliatory ac-

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tions cut across all terms and conditions of employment, and do not simply refer to discharge.

A whistleblower who alleges retaliation can bring an action within six to 10 years (depending on the facts of the case) after the improper treatment. If successful, the individual is entitled to the enhanced remedies of reinstatement with appropriate seniority status; double the amount of back pay otherwise owed, plus interest; and reimbursement of all litigation costs, including attorneys' fees.

Arbitration rules don't apply. Furthermore, the new rules exempt whistleblower claims from pre-dispute arbitration agreements, as well as permit whistleblowers to bypass administrative processes and bring claims in federal court, unlike the exhaustion requirement under SOX. At the same time, the SEC takes the position that it has the authority to enforce violations of the anti-retaliation provisions.

There are a number of steps companies can take now to bolster their internal policies and procedures.

Companies should check their employment policies and manuals and make sure that employees are not penalized for reporting to the SEC in the first instance, and that clear and stern anti-retaliation provisions are included. In addition, given the financial incentive for an employee to report internally to compliance personnel, and a com-

pany's obvious interest in learning of a potential violation before the SEC does, companies should ensure that they have robust policies to assist in identifying situations that must be reported, as well as policies and procedures for receiving and investigating tips and complaints.

A review of employee contracts and existing policies should be undertaken to ensure that confidentiality provisions and/or dispute reso-

At the same time, guidance will be needed as to how to continue to effectively "manage" the whistleblower, particularly the whistleblower who is demonstrating performance deficiencies while in this "protected" category. Indeed, as a general matter, whistleblowers are many times disgruntled employees, and it is essential to be mindful of this fact in handling disciplinary proceedings and terminations.

Manager awareness should also include emphasis on the fact that the anti-retaliation protections have teeth, that companies face exposure and that managers themselves can face discipline.

lution requirements do not violate the whistleblower rules. Managers should be educated and trained on how to "set the tone from the top," as well as how to receive complaints from employees and properly report them to legal and compliance personnel.

Managing Whistleblowers

Manager awareness should also include emphasis on the fact that the anti-retaliation protections have teeth, that companies face exposure and that managers themselves can face discipline, including termination, where they act adversely toward whistleblowers, regardless of whether the whistleblower is actually discharged.

Consequently, employers should consistently consult with outside counsel before taking employment actions that could be deemed retaliatory, and continue to ensure documentation is created and maintained to support the business justification for adverse employment actions.

Taking steps now to be prepared for the realities of the new whistleblower program will be an investment worth making — and ignoring the obvious impact of that program may be costly. •