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Your Counsel

Whistleblowing 101

More than ever before, we who practice law limit ourselves to a finite number of areas. Notwithstanding, people come to us with many problems which fall outside our expertise.

Although a little knowledge is dangerous, the goal of this column is to share practical information so that you can assist people with employment, disability benefit, workers' compensation and related problems.

Wikipedia defines whistleblowing as disclosing "information to the public or to appropriate authorities concerning the illegal or socially harmful actions of a person or group, especially a corporation or government agency." Retaliation against whistleblowers is common.

Here are the basics that you need to know:

1. Every disclosure of information is *not* protected by law. You must first determine whether the information is protected by statute, regulation or common law.

2. Every adverse action against a whistleblower is *not* illegal. Even if the disclosure was protected, you must show that it was a motivating factor for the adverse action.

3. Qui Tam (aka False Claim) laws give people a financial incentive to blow the whistle on fraud against the government.

4. The New York False Claims Act rewards a person who blows the whistle on a fraud against the state, a county or a local government. Examples of fraud include:

- Seeking payment for services *not* performed or goods *not* supplied (e.g., contractor who bills Monroe County for work it did *not* do);

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- Seeking payment for services performed or goods provided under a contract secured by fraud (e.g., contractor who rigged the bids and secured a construction contract by fraud);
- Falsely certifying compliance with a government contract (e.g., contractor who certifies falsely that they used Grade A concrete); and
- Making a false statement to avoid paying money otherwise owed (e.g., refuse contractor who lies about the amount of garbage it collects for a town and, thus, pays less to that town for being the exclusive refuse contractor).

Those who rip off the government are liable for: (1) *Three times* the amount of the fraud; (2) civil penalties of $6K-$12K per violation (e.g., each false invoice may be considered a separate violation); and (3) attorneys' fees and costs incurred by the whistleblower. The statute of limitations is 10 years.

5. The federal False Claims Act is similar to the state law. It rewards a person who blows the whistle on a fraud against the U.S. government. One example of fraud is a medical care provider who seeks payment from Medicare for services *not* performed on a patient.

- Those who rip off the U.S. government are liable for: (1) *Three times* the amount of the fraud; (2) civil penalties of $5,500-$11K per violation; *and* (3) attorneys' fees and costs incurred by the whistleblower.
- The statute of limitations is the longer of: (1) six years from when the fraud is committed; or (2) three years after the United States knows or should know about the material facts, but not more than 10 years after the violation.

6. The whistle blower is entitled to collect a percentage (as much as 30%) of the money that the federal or state government recovers from those responsible for the fraud.

7. Employees in New York who blow the whistle on fraud against the government are protected from adverse action (e.g., firing, demotion, suspension) by their employers. An employer who violates this part of the New York False Claims Act is liable to the employee for his lost pay and benefits, a penalty of two times the amount of his back pay (plus interest); and compensation for special damages caused by the violation, including litigation costs and reasonable attorneys' fees.

8. There is limited protection for those who blow the whistle about other issues.

- New York Labor Law § 740 prohibits an employer from retaliating against an employee who discloses an activity of the employer that violates law, rule or regulation *so long as* the violation "creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud." In my experience, this standard is very difficult to meet.
- New York Labor Law § 741 prohibits an employer from retaliating against

an employee who discloses an activity of the employer that the "employee, in good faith, reasonably believes constitutes improper quality of patient care."

• These whistleblower statutes are enforced by filing a civil action against the employer within one year from the date of the alleged retaliatory personnel action.

• An employee who complains in good faith about unlawful discrimination in the workplace is protected from retaliation under state (which applies generally to employers who employ 4 or more) and federal (which applies generally to employers who employ 15 or more) law. These laws are enforced by filing a charge of unlawful retaliation with the appropriate law enforcement agency. The statute of limitation to protect rights under state and federal law is 300 days from the date of the alleged retaliatory personnel action.

There are other whistleblowing statutes as well (e.g., Sarbanes Oxley Act, which protects whistleblowers employed in a publicly traded company). Do your homework before counseling a client on a whistleblower case.

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