Continuing Prominence Seen for Whistleblowers,

as Appeared in The New York Law Journal's Regulatory Reform Special Section

1/11/2010
Allen B. Roberts

As appeared in New York Law Journal's Regulatory Reform Special Section, Jan. 11, 2010.

Across industry lines, in both the public and private sector, businesses and other organizations looking for signals of the new year's tone are likely to see whistleblowing as a continuing factor.

Last year's bailouts and stimulus, and the events leading to them, have altered expectations and perceptions of security, risk and opportunity, and who the stakeholders are. A mood of populism emerged, accompanied by an enhanced regard for whistleblowers, as both market and regulatory failures were faulted for economic and other ills. The Fraud Enforcement and Recovery Act of 2009 (FERA)[1] amendments to the False Claims Act (FCA)[2] and the stimulus package whistleblower provisions of the American Recovery and Reinvestment Act of 2009 (ARRA)[3] assure continuing whistleblower prominence as programs funded by the federal government advance.

The focus of the FCA, as invigorated by FERA, is false records and fraudulent or false claims having a nexus to federal funding, and whistleblower protection is available for lawful acts done in furtherance of efforts to stop an FCA violation.)[4] ARRA broadly protects disclosures that need not rise to the level of fraud or falsehoods; protection is available for disclosures by individuals performing services for recipients of stimulus package covered funds of important, but less extreme, matters going to gross mismanagement, gross waste, substantial and specific danger to public health or safety, abuse of authority, or violation of a law, rule or regulation related to an agency contract or grant.)[5]

Laws like FERA and ARRA were enacted to assure that an earnest whistleblower could carry the compliance message without employment reprisal as government funding expanded. In theory and practice, whistleblowing can be a natural, beneficial extension of internal corporate compliance, or it can be a calculated maneuver for personal advantage.

Ideally, a whistleblower altruistically identifies a matter of significance to an organization that has gone astray and acts appropriately to have the matter addressed so it may receive an appropriate response. However, some are motivated by windfall gain or statutory protection to cloak unacceptable performance when legitimate, known factors put continuing employment in jeopardy.

For organizations charged with whistleblower violations, the stakes can be high, not merely because of legal issues and potential liability, but because of the reputational risk in the marketplace. A whistleblower complaint generally goes to the heart of whether an organization has adhered to an established standard of conduct by exposing corporate information otherwise shielded from view by the public, the media, competitors and business associates. And who better to know such restricted information than insiders in key operating, strategic, financial and legal positions?)[6]

Who the Whistleblowers Are

Whistleblowers tend to fall into either of two categories: qui tam relators, who stand to participate in the government's economic recovery for false or fraudulent billing or contract performance, and those seeking redress for unfavorable employment-related personnel action alleged to be in retaliation for some statutorily protected activity.

The lead statutory vehicle for the qui tam relator is the federal FCA, amended in 2009 by FERA, which allows for a potentially enormous award amounting to a 15 percent to 30 percent share of the U.S. government's total recovery, subject to various factors used to value the relator's contribution and entitlement.)[7]

Unlike the qui tam relator, the whistleblower claiming an adverse employment action typically seeks a conventional "make whole" remedy, likely to include elements of reinstatement and back pay, with a possibility of compensatory damages and recovery of attorneys' fees, although there are variations depending upon the statute invoked.

Employee-whistleblowers are not like others potentially making claims against their employers. They are distinguished not only by their unique access to non-public information that tends to be the predicate of their statutory protection, but also by the nature of the issue they raise. A whistleblower raises issues different from those whose protected status is rooted in a personal characteristic statutorily recognized among relatively universal federal and state equal employment opportunity (EEO) protections: age, race, sex, national origin, religion, disability.

Even where EEO claims raise common issues, similar and typical among employees and subject to consideration as class or collective actions, they are inherently personal. The individual or group of individuals feels targeted for some element over which there is no control and that cannot be avoided or changed by an employee or the employer. Rather than raising a personal "me" issue, the whistleblower raises a corporate "us" issue; the whistleblower asserts that the protected issue raised pertains not to any characteristic about him or her, but, instead, to compliance by the employing organization.

The Claims

One obstacle that continues to be encountered by those asserting whistleblower claims is that legislated protection does not always mirror compliance standards or keep pace with them.

A clear example is the whistleblower protection enacted as part of the Sarbanes-Oxley Act of 2002 reforms responsive to certain corporate scandals and intended to promote governance, transparency, accountability, internal controls and best practices. Sarbanes-Oxley embedded in the compliance archetype a hotline feature, required for companies with publicly traded securities, but soon adopted by all manner of organizations as a best practice.

Under Sarbanes-Oxley, the audit committees of listed issuers are required to establish procedures for the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.)[8]

It might have been expected that Sarbanes-Oxley would provide whistleblower protections coextensive with the

hotline disclosures it encourages. It does not; activity is protected only if the employee acts lawfully to address wrongs within a category of express unlawful activity or matters subject to securities regulation. To win statutory protection, the activity must relate to mail frauds and swindles (18 U.S.C. §1341), fraud by wire, radio or television (18 U.S.C. §1343), bank fraud (18 U.S.C. §1344) or securities fraud (18 U.S.C. §1348), or to any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders. [9]

Relative to the prominence of their claims within organizations and in the media, whistleblowers have experienced a low rate of litigation success, notably under Sarbanes-Oxley, where published reports show litigated outcomes favorable to claimants in single digits.[10] To some, a low rate of success indicates that existing legislative protections are working well and attaining compliance. Organizations that have prevailed in the defense of whistleblower claims are more likely to attribute their successful defense to sound policies and controls; a compliance program that worked, with business, operations and human resources functions each performing appropriately in its role.

Critics perceive fundamental flaws in the statutory scope of protection or in the process or mechanisms for redressing wrongs. Not surprisingly, the whistleblower advocacy bar has tended towards the latter, seeking "corrective" legislation that would reform laws that have been literally or narrowly construed.

With the recorded success of whistleblower claims in litigation falling short of some expectations, legislative initiatives have been underway, and more can be anticipated. In a recently published report, the Internal Revenue Service specifically notes the value of whistleblowers and their concern for confidentiality, including in its recommendations new legislation "to ensure that informants are protected against retaliation by their employers and to provide specific relief to informants who are retaliated against."[11]

Protections Vary Widely

Despite their common core elements, whistleblower protections vary widely, and success or frustration in whistleblower litigation continues to be the product of definitions of protections and procedures for advancing claims rooted in diverse statutes. For the most part, existing federal legislation does not currently confer the sort of broad whistleblower protections available in New Jersey,[12] Connecticut[13] and several other states[14] that expansively include within their protections violation generally of laws, rules, regulations and/or ordinances.[15]

While some federal whistleblower protections also refer broadly to violation of a "law, rule or regulation," the reach is limited to the purposes of the statute, as with stimulus package covered funds under ARRA. The 2008 Consumer Product Safety Improvement Act similarly extended protections for whistleblowing about laws and related orders, rules, regulations, standards and bans, but restricted those protections to the realm of federal consumer product safety.[16] And even without fruition of ongoing efforts to expand its reach by amendment, the Whistleblower Protection Act of 1989 protects federal employees from adverse personnel action with respect to certain types of disclosures, including information reasonably believed to evidence a violation of a law, rule or regulation.[17]

A unified body of whistleblower law is not likely to emerge, and each statute needs to be assessed for what it does and does not say, as well as the administrative and judicial interpretations that follow. Fourteen diverse statutes assign responsibility to the Secretary of Labor for protecting whistleblowers from retaliation, with the Occupational Safety

and Health Administration (OSHA) designated to receive and investigate complaints and make determinations of merit, and Department of Labor administrative law judges empowered to conduct hearings, followed by discretionary review by the Secretary of Labor.

A Final Rule published in 1996 delegates authority and assigns responsibility to an Administrative Review Board (ARB) to act for the Secretary of Labor in issuing final agency decisions on questions of law and fact arising in review or on appeal of decisions and recommended decisions of administrative law judges charged to hear and determine whistleblower claims under an array of statutes.[18] Notwithstanding the appointment of ARB members to two-year terms, the Secretary of Labor retains the sole discretion to remove any ARB member at any time,[19] so shifts may come if incumbents are replaced to better reflect the interpretive and enforcement objectives of a new Secretary. A keynote of change to come may have been sounded when Secretary of Labor Hilda Solis declared in her first speech following confirmation, "There is a new sheriff in town."[20]

Even with the potential for change coming from new Department of Labor appointees, matters tried before administrative law judges and subject to ARB review may be more likely to be construed with consistency than ARRA claims that could be decided differently by heads of the 28 federal departments and agencies distributing stimulus package covered funds, each acting upon the investigation and report of that agency's inspector general.[21] Furthermore, some whistleblower claims, such as those under the FCA, are not designated for agency consideration at all, and construction comes entirely from court interpretations of statutory protection.[22]

The Organizational Impact

To some, the patchwork of whistleblower protections is being stretched at its seams; others believe the fabric is sound.

Whatever one's perspective, it is clear that organizations are increasingly aware of the role of whistleblowers in their corporate compliance. As FERA and ARRA show, the opportunity to expand business horizons, particularly through government programs or funding, brings the potential of increased regulation, accompanied by internal and external scrutiny and protection of whistleblowers.

Congressional initiatives in 2009, realized in enactment of FERA and ARRA, show that the American populace is increasingly invested in how government funds are managed relative to their intended purposes. With that type of commitment, whistleblowing that faults recipients of government funds for wrongdoing that violates a legislated standard of conduct has become more mainstream than ever before.

Current and future schemes of protection may channel disclosures to a regulatory, enforcement, legislative or judicial body, or to some individual or committee within the organization having authority to investigate, discover and/or terminate misconduct. But, whatever the impetus or the enforcement mechanism, at the end of the day, whistleblowing hits home, and that is where it is addressed best.

Because whistleblowing implicates two distinct issues, corporate compliance and individual rights to not suffer employment reprisals, it creates a duality that invites consideration of the best composition of in-house or outside designees to fulfill the separate investigative and decision-making functions with respect to the corporate issue

raised by the whistleblower, as well as the personnel issue that attends protected activity.

If internal mechanisms are not trusted to detect and prevent compliance lapses and to monitor and correct noncompliance, a new wave of outward-directed whistleblowing may emerge. In some measure, this could be accomplished by invoking existing laws and facilitated by more receptive agencies, courts and juries. But the impact of new legislation, amending prior law and creating new standing, is likely to be a factor, as well. The start of 2010 is a good time for all types of organizations to catalogue whistleblower laws applicable to current and foreseeably expanded activity, directly or as a subcontractor or secondary recipient of government funding.

The ascendency of whistleblowing, together with initiatives to expand and energize whistleblower protections, should not be surprising in today's political, legislative, economic and legal environment, and there are no indicators that 2010 will show declining interest.

Pipelines may be long and processes viscous, but the amounts of federal dollars that will be spent and the interest funding programs attract combine to suggest that whistleblowing will have increasing prominence on the compliance stage. If organizations were to disregard their own compliance responsibilities, others could be incentivized to step in and fill any void, possibly relying on pieces in the mosaic of whistleblower protections.

Reprinted with permission from the January 11, 2010, issue of The New York Law Journal.

---

[1] Pub. L. No. 111-21, 123 Stat. 1617 (2009).

[2] 31 U.S.C. § 3729, et seq.

[3] Pub. L. No. 111-5, 123 Stat. 115, 297 (2009).

[4] 31 U.S.C. § 3730(h)(1).

[5]See Pub. L. No. 111-5, 123 Stat. 115, 297 (2009).

[6] See, e.g., Van Asdale v. Int'l Game Tech., 577 F.3d 989, 994-96 (9th Cir. 2009) (Sarbanes-Oxley claims by former in-house attorneys survive summary judgment, despite confidentiality concerns of attorney-client privilege).

[7] See 31 U.S.C. § 3730(d)(1) and (2).

[8] 15 U.S.C. §78f (m)(4).

[9] See 18 U.S.C. § 1514A(a).

[10] Jennifer Levitz, Shielding the Whistleblower, Wall Street Journal, December 1, 2009; Richard Moberly, Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win, 49 Wm. & Mary L. Rev. 65 (2007).

[11]Final Audit Report – Deficiencies Exist in the Control and Timely Resolution of Whistleblower Claims (Reference Number: 2009-30-114), at 3 (August 20, 2009).

[12]See N.J. Stat. Ann. 34:19-1, et seq.

[13] See Conn. Gen. Stat. § 31-51m, et seq.

[14] See e.g. Cal. Lab. Code § 1102.5(a)-(d).

[15] New York law has similarly broad language, but it is applicable only to matters that create and present a substantial and specific danger to the public health or safety. See N.Y. Lab. Law § 740(2); see also Reddington v. Staten Island Univ. Hosp., 11 N.Y.3d 80 (2008).

[16] See 15 U.S.C. § 2087(a).

[17] See 5 U.S.C. § 2302(b)(8).

[18] Establishment of the Administrative Review Board, 61 Fed. Reg. 87, 19982 (May 3, 1996).

[19] Authorities and Responsibilities of the Administrative Review Board, 61 Fed. Reg. 87, 19978-79, (May 3, 1996).

[20] Steven Greenhouse, At Labor Gathering, Luxury, Jockeying and Applause for Secretary, N.Y. Times, March 8, 2009, at A22.

[21] A listing is available at: http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/STATUTES/WHISTLEBLOWER_STATUTES.HTM.

[22] See 31 U.S.C. § 3730(h)(2).