CORPORATE COUNSEL

NOT FOR REPRINT

Click to Print or Select '**Print**' in your browser menu to print this document.

Page printed from: *Corporate Counsel*

Effective Employee Training Increasingly Important Amid Increased Whistleblower Liability and Damage Awards

Gregory Keating and Lyndsey Kruzer, Corporate Counsel

January 12, 2017

In the past month, the U.S. Department of Labor (DOL) awarded $1.9 million to a whistleblower who resigned his position after a negative performance review, and a jury awarded $20 million to another whistleblower who was allegedly terminated after making internal reports of fraud. These massive financial awards are consistent with a larger trend. Recently, employers are facing a greater risk of liability for whistleblower retaliation than at any time in history. One development fueling this change is that courts and some government agencies have drastically expanded what it means to be a "whistleblower" whose conduct is protected. Given these recent developments, employers must double down on compliance initiatives. A critical component to any effective compliance program is the need to train employees on whistleblowing and retaliation.

Whistleblowing claims are on the rise, and the courts and judiciary are making it more difficult for employers to prevail when facing a claim. Generally speaking, in order to prevail on a claim for whistleblower retaliation, an employee must prove that he or she engaged in protected conduct by making a good-faith report of suspected misconduct and that he or she suffered an adverse employment action as a result of engaging in such protected activity. Although this seems like a relatively straightforward standard, recent court and agency decisions have added another layer of challenge for employers by drastically expanding the definitions of both "protected activity" and also "adverse employment action."

Historically, it was relatively simple for an employer to identify what might be considered protected activity for the purposes of whistleblowing. Recent legal developments under the Sarbanes-Oxley Act (SOX) illustrate that the concept of "protected activity" has expanded dramatically and is significantly more difficult to identify in the moment. For several years, the Department of Labor's Administrative Review Board (ARB) followed its 2006 decision in *Platone v. FLYi*, which held that in order to prove that he or she engaged in "protected activity," a whistleblower must demonstrate that his or her conduct "definitively and specifically" relates to one of the six categories of unlawful acts set forth in the statute. After following this standard for over five years, though, the ARB revised its

position in 2011 in *Sylvester v. Parexel*, a decision which dramatically broadened the scope of protected activity under SOX. In *Sylvester*, the ARB held that would-be whistleblowers claiming retaliation need not identify fraud with specificity to be engaged in protected activity but may engage in protected activity simply by making general complaints. Several courts followed suit, adopting the more lenient standard than *Platone*.

This year, the ARB again broadened the scope of protected activity in *Dietz v. Cypress Semiconductor*. The employee in that case was disciplined and eventually resigned his position within two months of raising issues related to the company's bonus compensation program. While the employee merely alleged that the company violated state wage laws, the ARB found that, implicit in his complaints were allegations that his employer had committed federal mail and wire fraud. The employee never told the company that he thought the bonus plan was fraudulent, but he testified at the hearing in this matter that he believed the bonus plan was fraud. Because the company had executed and administered the bonus plan via email, a website and interstate video conferencing technology, the ARB found that the employee's complaints could be reasonably construed as complaints of mail fraud and wire fraud, even if the employee did not initially complain that the plan was "fraud" or "fraudulent."

Dietz likewise illustrates the other trend in whistleblower decisions: a broadening of what is considered an adverse employment action. The ARB found that the employee suffered an adverse employment action even though the employee was not terminated, but rather felt compelled to resign after being disciplined for an arguably unrelated performance issue. Following this trend, in November 2016, a DOL administrative law judge (ALJ) awarded $1.9 million in damages to an alleged whistleblower who resigned after his protected conduct. In *Becker v. Community Health Systems*, the ALJ found that the employer had repeatedly asked the employee to revise his projections concerning the company's earnings before interest, taxes, depreciation and amortization (EBITDA). The company presented evidence at the hearing that the revised numbers it wanted the employee to certify came from the employee's own spreadsheets and calculations. However, the ALJ was unconvinced and believed that the employee had a good-faith belief that he could not certify the projected EBIDTA at the company's requested amount. Therefore, the ALJ reasoned that the employee's decision to resign amid pressure to revise his projections constituted "constructive discharge" and was therefore an adverse employment action.

Given the expansion of protected activity and adverse employment action that may lead to whistleblower liability, identifying potential whistleblower situations is less intuitive than ever, particularly to frontline managers who may not be experienced in this area. Nevertheless, recent statistics from the Ethics Resource Center show that 91 percent of employee complaints of potential fraud or unlawful activity are first made internally. Even more astonishing, around 56 percent of initial complaints are first made to an employee's immediate supervisor, compared with 26 percent made to higher management and 5 percnt made to ethics hotlines. Considering the potential consequences of mishandling complaints, this situation creates a challenge for employers.

Companywide training, however, can both prepare supervisors to identify and process complaints properly and can also help to direct employee complaints to appropriate channels. Moreover, well-designed employee training programs are not only a best practice, but they are increasingly becoming a legal requirement. Guidance issued by the Equal Employment Opportunity Commission (EEOC) in August 2016 emphasized the importance of employee training in combating retaliation and claims of retaliation. The guidance strongly suggests that employers

"train all managers, supervisors, and employees on the employer's written anti-retaliation policy" and "send a message from top management that retaliation will not be tolerated, provide information on policies and procedures in several different formats, and hold periodic refresher training." Similarly, California recently increased the requirements for its state-mandated training programs. These mandatory trainings must now include not only a discussion of supervisory obligations to report retaliation, but also the remedies that may be available in civil actions for victims of retaliation. On the horizon, the DOL will soon issue guidelines for an effective compliance program, which will likely stress the paramount importance of management training.

Whether legally mandated or not, though, effective employee training programs provide a meaningful opportunity for employers to prevent problems before they happen and address existing problems promptly. According to the Ethics Resource Center's 2016 Global Ethics Report, of those employees who report suspected misconduct or fraud externally, 84 percent said they did so only after trying first to report internally. This statistic illustrates that employers can curtail problems before they are reported externally, but only if those problems are, in the reporting employee's eyes, taken seriously and addressed properly. As an important initial step in this process, effective training of all employees in supervisory positions is a powerful tool for increasing proper complaint management and decreasing potential liability. Well-constructed supervisor training must explain in sufficient detail, but in a digestible manner, both the range of potential protected activity, as well as the range of what might be considered retaliatory adverse employment actions. If supervisors are trained to identify complaints and bring them to a compliance officer, human resources, or other appropriate management employees, many problems might be solved before an employee chooses to report externally. Moreover, raising supervisors' awareness of the range of "adverse employment actions" make them better-equipped to manage whistleblowing employees after a complaint is made.

In order to foster a culture in which employees believe their complaints will be taken seriously, training for the entire workforce on these issues is critical. The 2016 Global Ethics Report found that internal reporting rates were significantly higher when employees perceive a strong or strong-leaning ethical culture in their company than when employees perceive a weak or weak-leaning ethical culture. Thus, training of all employees should emphasize the company's commitment to compliance and ethical conduct, the company's reporting procedures, the company's process for investigating and addressing complaints, and, perhaps most importantly, the company's zero tolerance for retaliation against employees who bring good-faith complaints forward.

By implementing these trainings and regularly refreshing both supervisory and nonsupervisory employees of their rights and obligations, companies take an important step toward both increasing internal compliance and preventing potential liability. As the damages awards for whistleblower retaliation drastically increase, the upfront use of resources to train employees becomes an even more prudent investment so that employers do not find themselves at the losing end of the next multimillion-dollar verdict.

Gregory Keating is chairman of Choate Hall & Stewart's labor employment and benefits and whistleblower defense practice groups, and recognized as a national authority in the area of whistleblowing and retaliation. He can be reached at gkeating@choate.com. Lyndsey Kruzer is a senior associate in the labor, employment and benefits practice group at the firm.

Copyright 2017. ALM Media Properties, LLC. All rights reserved.