

4 Keys To Handling Whistleblower Claims

By **Shannon Henson**

Law360, New York (October 06, 2010) -- With the financial reform bill's new economic incentive for whistleblowers, properly advising a client on how to deal with an informant has become one of the most valuable services a lawyer can provide, experts say.

Whistleblower complaints are "the hottest claims in America right now," thanks in part to the Dodd-Frank Wall Street Reform and Consumer Protection Act, said Gregory Keating, a shareholder at employment and labor firm Littler Mendelson PC.

Unlike before, the bill allows whistleblowers to go to the U.S. Securities and Exchange Commission or another government agency anonymously.

If the government wins a recovery in excess of \$1 million as a result of the information, the whistleblower is entitled to 10 percent to 30 percent of the amount, said Wally Dietz, co-chair of the internal investigations practice at Bass Berry & Sims PLC.

"Combining very large financial incentives with the ability to remain anonymous until a recovery is certain will undoubtedly encourage whistleblowers to make allegations and provide information to the government," Dietz said. "Congress has fundamentally changed the rules of engagement and provided large financial incentives to encourage whistleblower activity and there's no doubt these changes will result in just that."

As companies struggle to deal with this new landscape, lawyers share their best tips with Law360 on how to advise a client facing such a claim.

1. Cut Management Out of the Loop

During an internal investigation, company personnel may need to be taken out of debriefings to avoid claims of intimidation or allegations that witnesses were coached, said Christopher Clark, co-head of Dewey & LeBoeuf LLP's white collar criminal defense and investigations practice group.

"It's delicate client counseling," Clark said. "You have to tell the client to step aside, and let us figure out the basis of this thing so we can give you good advice."

Dietz said allowing management to be present during witness interviews "can compromise the investigation itself, and may jeopardize credibility with the government if the investigation reaches that level of scrutiny."

Also, a company can protect attorney-client privilege and obtain the benefit of the attorney work product doctrine by letting counsel handle the investigation rather than company management, he said.

2. Don't Spend Too Much Time Seeking Out the Whistleblower

Companies may often learn of the alleged problem through an anonymous call on a company tip line or even through a subpoena. Barry Mandel, chair of the securities enforcement and litigation practice at Foley & Lardner LLP, said it's almost instinctive to try and find out who made the claim, so that a company can know how to communicate without the government "essentially having a telephone in your office."

Some efforts to do so, however, can end up tarnishing a company.

"It looks like the company is focusing on the wrong issue," Mandel said. "It must be done with extreme care."

And if the whistleblower made an anonymous claim internally, that person wanted to remain anonymous for a reason, Mandel said.

"The fact that they have now been identified can cause all sorts of problems," he said.

Clark said that in the "day and age of (instant messaging) and e-mails, it doesn't take a rocket scientist to figure out" who made a claim.

But a company cannot be accused of retaliating against the whistleblower if they don't know who made the claim.

3. Don't Retaliate

It's basic, yet lawyers said clients need to be reminded of the most important aspect of dealing with a whistleblower: Don't fire them.

"The key phrase is no retaliation," Mandel said.

Chuck Miller, a shareholder at and director of Bartko Zankel Tarrant & Miller, said employers have to be careful not to take "any adverse action" against a whistleblower.

Stuart Slotnick, vice chair of business litigation and trial practice at Buchanan Ingersoll & Rooney PC, said that, once a whistleblower emerges, "they should not be exposed to hypersupervision or new managerial criticism. A corporate defendant should ensure that a whistleblower is not terminated as a retaliatory measure."

A company must also carefully consider who should be told about the whistleblower, said Steven D'Alessandro, a litigation partner at Holland & Knight LLP.

If the whistleblower's supervisor doesn't know, a company has "gone a long way to avoiding or giving itself good protection against a retaliation claim," he said.

It's also a good idea to educate employees on what a working claim of retaliation actually means, D'Alessandro said. Retaliation doesn't just occur when a whistleblower is fired, but also when he is cut out of meetings or faces changed duties, among other things, he said.

4. Embrace the Whistleblower

Mandel said a company may want to encourage a whistleblower to cooperate with its investigation because embracing the whistleblower rather than treating him as an adversary may be smart.

"Understanding the story from the whistleblower's perspective, and learning how they got the information" may allow the company to better address their concern, he said.

Keating said employers may want to go so far as to do "good deeds" for a whistleblower, such as allowing them an opportunity to leave early to pick up their child.

"It helps weaken the causal chain of any whistleblower" making a retaliation claim, he said.

Companies also may want to consider telling a whistleblower the outcome of an internal investigation, lawyers said. This, however, is tricky, because a company may be arming the whistleblower with potentially damning information that they could hand to a regulator or use in a private lawsuit, they said.

“The traditional view is to not share it with them, and simply tell them the review is completed and that the company is taking the appropriate action,” Mandel said. “Sometimes in real life, it doesn't work out to say to a whistleblower, 'Thanks a lot, but we can't tell you what we found.' If the whistleblower isn't satisfied, where do they go? They go to the government.”

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