EMPLOYMENT LAW360

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Practical Ways To Avoid Whistleblower Lawsuits

Wednesday, Jan 02, 2008 --- Congress enacted the first False Claims Act in 1863 in response to widespread procurement fraud in Civil War defense contracts. The False Claims Act was a little used anti-fraud enforcement vehicle for over a century before Congress re-invigorated the Act with sweeping amendments in 1986.

As currently structured, the False Claims Act subjects those who knowingly submit, or cause another person or entity to submit, false claims for payment of government funds to liability in the form of three times the government's damages plus civil penalties of $5,500 to $11,000 per false claim. See 31 U.S.C. §§ 3729-3733.[1]

The most novel characteristic of the False Claims Act is the ability of private citizens – referred to as qui tam relators – to bring civil actions on behalf of the United States for violations of the statute. A qui tam relator may recover a portion of the funds recovered under the False Claims Act, typically between 15 and 25 percent. A qui tam lawsuit is filed and remains under seal for at least 60 days, during which the Department of Justice can investigate and decide whether to intervene in the action.

An analysis conducted by the United States Government Accountability Office in December 2005 found that the government intervened in only 30% of qui tam cases filed under the False Claims Act.[2] Thus, the vast majority of False Claims Act cases are prosecuted by private parties. And many of these qui tam relators are former employees of the corporate targets of false claims litigation.

In light of: (a) the False Claims Act's treble damages and penalties and attorney fees provisions – which make nearly every False Claims Act case a "big case";(b) the fact that a large percentage of False Claims Act cases are brought and prosecuted by whistleblowers; and (c) the fact that a large percentage of whistleblowers are disgruntled former employees of the defendant company, it is prudent for companies to take steps to minimize their False Claims Act exposure in dealing with terminated or departing employees. One obvious way to manage this risk is through releases in separation agreements.

The Ninth Circuit's decision in United States ex. rel. Green v. Northrop Corp., 59 F.3d 953 (9th Cir. 1994), seemingly eviscerated the enforceability of contractual releases that purport to restrict an individual's right to serve as a relator under the False Claims Act.

In Green, the Ninth Circuit held that the benefit of enforcing such private

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contractual releases was outweighed by the public's interest in having the government informed of potential fraud and to recover the substantial revenues that qui tam actions yield.

The Green court reasoned that enforcing such contracts would permit violators to minimize their exposure and would-be relators to maximize their recovery, all at the expense of the public. The Green court concluded that enforcing pre-filing qui tam releases would undermine the entire False Claims Act, which is predicated on providing whistleblower incentives to disclose fraud against the government.

For more than a decade, the only chink in Green's armor involved the narrow, limited circumstance where an employer was able to credibly demonstrate that the government was fully informed of and had an opportunity to investigate all the alleged wrongdoing before a qui tam release was executed by the former employee and would-be relator. See United States ex rel Hall v. Teledyne Wah Chang Albany, 104 F.3d 230 (9th Cir. 1995).

Under those conditions, the Ninth Circuit found that the public policy considerations articulated in Green were largely inapposite and did not serve to thwart the enforcement of the contractual release.

In a 2005 decision, the district court for the Southern District of Georgia breathed at least a little life into post-employment qui tam releases. In United States ex rel. Whitten v. Triad Hospitals, Inc., the relator brought suit under the False Claims Act for alleged health care fraud. See 2005 WL 3741538 (reversed on other grounds).

The federal government declined to intervene in the case, meaning the relator continued to litigate the action without the government's participation but nominally on behalf of the federal government.

The relator, a former employee of defendant's corporate predecessor, had previously signed a severance agreement that contained a general release of all claims and specifically restricted the filing of any future complaint related to "any alleged improper billing practices." Id. at *3. The defendant brought a motion to dismiss based on the contractual release. Citing Green, the relator argued that the release was unenforceable.

The district court distinguished Green on the basis that the government had declined to intervene, concluding that public policy favored the enforcement of the private contract in such a case. The Whitten court reasoned it was proper to bar a relator from maintaining a qui tam action where the government declined to intervene in the False Claims Act suit, because such a restriction did not unduly impinge on the public policy considerations articulated in Green.

The Whitten court appeared to draw a distinction between a release that purports to bar the filing of a qui tam complaint, which Green clearly rejects,

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versus maintaining a qui tam action after the government has an opportunity to investigate the claims and declines to intervene.

The district court acknowledged that such a rule might make a would-be relator less inclined to disclose fraud on the government through the filing of a qui tam action. But, the court noted, citizens do not have an unfettered right to proceed as relators, and, it reasoned, the recoveries available to relators in actions where the government does choose to intervene would still provide sufficient incentive to disclose potential government fraud.

The Whitten case was subsequently reversed on other grounds. See Whitten v. Triad Hospital, Inc., 210 Fed.Appx. 878 (11th Cir. 2006).[3] No federal court has since addressed the issue of qui tam releases.[4]It is likely that a majority of courts assessing a pre-filing release purporting to sever only the right of a relator to maintain a non-intervened qui tam action would hold such a restriction violative of the public policy considerations enumerated in Green.

Nevertheless, the reasoning in Whitten provides at least a colorable basis for attempting to contractually restrict the maintenance of non-meritorious qui tam actions.

In light of the uncertainty in the law, does it make sense for employers to include Whitten-style releases in employment separation agreements? We think it does. Disgruntled former employees are one of the main sources of whistleblower lawsuits. A December 2005 GAO report indicated that the government declines to intervene in 70% of qui tam cases.

In addition, a recent report surveying over 1,000 whistleblower lawsuits brought under Sarbanes-Oxley over the past five years found that only approximately 2% of those cases were deemed meritorious after government investigation into the allegations.

The report found that many whistleblower lawsuits attempted to bootstrap garden-variety workplace disputes into fraud allegations, or involved ex-employees who had engaged in serious misconduct or poor job performance and not termination for whistleblower activities. Any steps that can be taken to limit exposure in this area seem prudent.

A few relatively easy steps an employer can take to manage the risk of whistleblower suits include the following:

*Include language in any release or waiver that accompanies a standard severance agreement to specify the signatory's obligation to report any information about alleged wrongdoing on the part of the company and a prohibition against maintaining a qui tam action if the government declines intervention. In fact, the severance agreement could contain an express provision entitled "compliance representations," or words to a similar effect, through which the signatory is required to list any and all information relating to compliance-related issues, or to represent that he/she is aware of none.

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*Include a provision in the severance agreement emphasizing that the signatory's compliance representations are material consideration for the employer, and that if such information is later found to be false (either what is listed or omitted), the signatory is required to disgorge all of consideration paid pursuant to the severance agreement.

*Include a provision in the severance agreement whereby the signatory agrees that if a compliance-related claim is later brought by the signatory and that such information was not disclosed in the severance agreement, that the signatory shall not personally obtain or retain any remedy as a result of such a claim.

*Conduct exit interviews with all separating employees and specifically ask whether they are aware of any false claims or other fraudulent conduct by the company. Ask for a certification that they are aware of no such conduct, or, if they are, to describe in detail any misconduct of which they are aware. Even if the release is not enforceable, if an ex-employee fails to disclose misconduct they later seek to rely on to support a False Claims Act case, their credibility will be undermined substantially. If they do disclose misconduct at the exit interview, the company will be much better positioned to manage the issue and its potential liability than it will be after a False Claims Act lawsuit is filed.

*Develop and implement a robust compliance program that creates an environment where employees will come forward with any concerns about fraud or potential false claims before they become disgruntled former employees.

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[1]Nineteen states and the District of Columbia have their own version of a false claims statute. Many of these state false claims laws are of very recent vintage. See, e.g., Oklahoma Medicaid False Claims Act, S.B. No. 889 (Nov. 1, 2007 effective date). More states are expected to enact laws prohibiting false claims.

[2]See GAO-06-302R (discussing intervention in the two largest type of cases brought under the False Claims Act – health care fraud and procurement fraud).

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[3]Interestingly, the Eleventh Circuit reversed on the grounds that the defendant – an agent of the corporation that actually entered into the release with the plaintiff – was not listed as one of the defined Releasees in the contract. See id. at 881.

[4]A current legislative proposal to amend the False Claims Act would expressly prohibit a "waiver or release" of a claim under the False Claims Act. See False Claims Act Correction Act of 2007. An express, statutory prohibition on any releases or waivers of FCA claims would necessarily render the rationale of the Whitten decision inoperable.

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