

Fox in the Hen House

Internal Investigations of Whistleblower Complaints and Dealing with the Whistleblower Employee

Bob Rhoad

Kris Meade

HOOPS2010
Crowell & Moring LLP

Whistleblowing – “Growth Industry” in Healthcare

- Healthcare Fraud Represents the Majority of Federal False Claims Act (FCA) Recoveries
- New Healthcare Fraud Laws at State and Federal Level
 - New York’s “HealthCare Whistleblower Law,” §741 NY Labor Law
- Focus of DOJ and State AGs – Substantial Potential Penalties
- Role of Whistleblower Employee – Responsible for 41% of Fraud Cases in the Healthcare Industry

Recurring Fact Pattern – Whistleblower Employee Alleges Retaliation

- *Pal v. NYU Hosp.* (S.D.N.Y. 2010)
 - Complaints to Dean of Medical School that incomplete medical histories were prepared for patients pre-surgery followed by employee suspension and, ultimately, termination
- *Puno v. Mount Desert Is. Hosp.* (D.Me. 2007)
 - Employee who alleged other employee violated HIPAA subjected to “heightened scrutiny focused on [her] previously tolerated absenteeism”

Part of Broader Pattern of Increasing Number of Retaliation Claims

- EEOC Statistics
 - 1997 – 18,198 charges of retaliation
 - 2009 – 33,613 charges of retaliation
 - 2009 – 36% of all charges allege retaliation
- Causes
 - Employees have better understanding of legal rights
 - High profile whistleblower cases with big dollar recoveries
 - *Burlington Northern* – Supreme Court Decision
 - Lowered threshold for actionable retaliation – any conduct that “could well dissuade a reasonable worker from filing a complaint”

Whistleblower Considerations – Internal Investigations - Triggers

- Internal formal written or oral complaint
- Regulatory/administrative subpoena
- Filing of a lawsuit
- Filing of a charge of discrimination or other agency filing
- Auditor's or Analyst's question
- Anonymous hotline tip

Key: Anything that provides notice of misconduct may trigger the need for an investigation

Avoiding Retaliation Claims from Whistleblowers When Conducting Internal Investigations

1. Decide who conducts the internal investigation
2. Begin with the End in Mind
3. Document, Document, Document
4. Keep it Confidential - confidentiality can kill causation
5. Know and avoid actions that constitute retaliation
6. Timing is critical - take appropriate action...carefully

Step 1- Who Conducts the Internal Investigation

- The Usual Suspects
 - Human Resources Professionals
 - In-House Counsel
 - In-House Compliance Function
 - Outside Counsel
 - A combination of the above
- Consider Implications for Known or Potential Whistleblower

Step 1 – Considerations When Determining Who Conducts the Investigation - Sliding Scale

- The allegations Involved
 - More serious = outside counsel
 - Government program risk = outside counsel
- Importance of the appearance of independence
 - More independence = outside counsel
- The purpose for which the results will be used
 - Greater confidentiality need = outside counsel
- Identity of alleged bad actors
 - More senior management = outside counsel
- Whether whistleblower has obtained counsel or filed a complaint
 - Administrative subpoena = outside counsel

Step 1 - Tips for Selecting the Investigator

- Experienced in Conducting Investigations
- Authorized By Applicable Policy or Board Resolution
- Industry Expertise
- Unbiased
- Avoid using Managers or Supervisors
- If allegations may reach to senior management, outside counsel project objectivity, thoroughness, deflect cover-up allegations and preserve applicable privileges

Key: Investigator is a potential witness and the investigation may be your best defense.

Step 2 – Begin with The End in Mind – Formulate Plan for the Investigation

- Determine Goal of the Investigation
 - Responding to regulatory inquiry
 - Concern for derivative class action
 - Hot line tip investigation – no known external oversight (yet)
 - Mandatory disclosure obligation under Federal Programs
- Define Scope of Investigation – who and what
- Decision Point Before Launching – written investigative report at conclusion?
 - Draws great attention - DOJ, plaintiffs lawyers, SEC
 - Consider “oral report plus” – oral report and key documents to Board; memorialize key report conclusions in minutes
 - But a written report could be filed with a court in response to a derivative class action lawsuit

Step 2 – Begin with The End in Mind – Formulate Plan for the Investigation

- Determine Witnesses and Sequence of Interviews
 - Interviewing the known whistleblower
 - Interviewing suspected, but unconfirmed, whistleblower
 - Interviewing target of the allegations
 - Interviewing other material witnesses
 - Former employees? (pros and cons)

Step 3 - Document, Document, Document

- Document every part of your internal investigation
- Gather relevant electronic documents
- Obtain sworn declarations of important witnesses
 - Considerations
- Consider document hold order

Step 3 - Electronic Documents

- “E” in Email stands for “Evidence”
- Capture email and computer files of all relevant witnesses
- Interview witnesses to verify complete document retrieval
- Consider examining whistleblower’s and target’s hard drive for deleted documents
- Don’t forget voicemail

Step 3 - Witness Interviews

- ◆ Schedule all witness interviews promptly - TIME IS OF THE ESSENCE when it comes to internal investigations
- ◆ Preparation - review all pertinent documents, key background information on the witness and all prior witness summaries before conducting witness interview

Step 3 – Witness Interviews

- Stress “Confidentiality” and Provide Non-Retaliation Pledge – all witnesses
- Ensure the witness understands you represent the company, not the witnesses
- Create Witness Outline *and* Prepare Summaries of Each Witness Interview
 - What to do with original notes
- Assess Credibility of Each Witness – may later be a deponent or trial witness
- Ask open-ended, non-leading questions
- Ask “is there anything else that we haven’t asked about that could be important to this investigation?”

Step 3 - Witness Interviews (Continued)

- ***DON'T*** promise witnesses complete confidentiality
- ***DON'T*** be afraid to stray from your witness outline - follow-up on all areas of questioning
- Ask the tough questions
- Be prepared for requests by either complaining party or accused to have an attorney present - “just say no”

Step 3 - Handling the Whistleblower Interview

- Determine when/what order to conduct interview
- At least two interviewers present
- Ask to tape record; otherwise take copious notes
- Whistleblower has no right to have attorney present
- Make and record non-retaliation pledge
- Conduct an interview, not an inquisition

Step 3 – Handling the Whistleblower Interview – Whistleblower Refusal to Participate

- Discipline an option?
- *Caldwell v. EG&G Defense Materials, Inc.*, ARB No. 05-101 (October 31, 2008)
 - Department of Labor’s Administrative Review Board (“ARB”) decision – entity that hears cases under Sarbanes-Oxley and other whistleblower laws
 - Complaint asserted under whistleblower provisions of several environmental statutes
 - Whistleblower hindered investigation
 - ARB affirms dismissal of complaint – hindering investigation is not protected activity

Step 4 - Keep it Confidential - Can Kill Causation

- Retaliation depends on cause and effect - whistleblowing caused the adverse job action
- A manager can't retaliate against a whistleblower if she never knew the employee blew the whistle...
- Let managers know *only* if they need to know
- Lack of manager knowledge = "Retaliation Insulation"
- Implications for Investigation

Step 4 - Anonymity and Confidentiality – Considerations for Publicly-Traded Companies

- SOX – requires anonymous and confidential reporting - may necessitate that the subject of an investigation receive notice of the specifics of the allegations
- Considerations – training of employees and Board members
 - Content - whistleblower hotline program and the protections given to employees under SOX
 - Include whistleblower protections in broader ethics policies
 - Define the role of Board members, officers or employees in the whistleblower investigation process
 - Maintain roster of training session attendees and materials used
 - Obtain signed attendance acknowledgement form from each employee

Step 5 - Know and Avoid Actions That Constitute Retaliation

- The Known Retaliatory Acts - Officers, Employees, Contractors, Subcontractors or Agents of Public Companies Cannot
 - **discharge, demote, suspend, threaten, harass or in any way discriminate** against an employee because the employee provided information or assisted in an investigation the employee reasonably believed to be in violation of any law relating to fraud against shareholders
- The Lesser Known Retaliatory Acts
 - Denial of family medical leave
 - Fewer work hours
 - Heightened level of scrutiny
 - No longer invited to certain meetings

Step 5 - Know and Avoid Actions that Constitute Retaliation – Maybe Not So Easy

- Protection even where whistleblower report of wrongdoing is incorrect – “reasonable belief” standard
 - Summary judgment difficult
- “Fox in the Hen House”
 - Compliance officer or lawyer as whistleblower
 - Whistleblowers with access to documents and data that might support claims – FCA arena
 - Administrative leave v. transfer v. termination

Step 6 - Timing is Critical - Take Appropriate Action ... Carefully

- Timing of Appropriate Action is Critical
 - Again, retaliation is about cause and effect
 - Courts differ on how long is “long enough” after whistle-blowing to break causation
 - Some courts have held that three months is long enough to break the causal link between whistle-blowing and job action; a year is almost always long enough
 - *But see – United States ex rel McCarthy v. Straub Clinic & Hosp.* (D. Hawaii 2001) – five years between FCA complaint and alleged harassment – employer motion to dismiss denied
 - Continuation of discipline that started *before* whistle-blowing is *not retaliation*

Step 6 - Timing is Critical - Take Appropriate Action ... Carefully

- Consider all remedial options
 - Typically a range of potential actions
 - Proactive v. reactive measures
 - Consider which actions a jury would think were appropriate
- Ensure consistency of remedial actions taken in prior similar cases
- Performance management v. avoiding retaliation claims – the rubber meets the road
- ***DON'T*** Delay in Taking Prompt, Appropriate Action

Step 6 - Take Appropriate Action – Practice Tips

- Take some action at the conclusion of the investigation, even if the action is a reiteration of applicable policy
- Consider implementing changes in practice or policy
 - *Something* usually triggered the complaint
- Because timing is critical, give whistleblowers time to “shape up” before they “ship out”

That Ounce of Prevention

- *Develop and Maintain a Vigorous Compliance Program*
 - Effective internal compliance programs are the most effective prophylactic measures
- *Act on Information Received*
 - Conduct investigation of all internal whistleblower complaints
 - If investigation reveals no problem, document what was done and the results
 - If the investigation reveals a potential problem, take action
- *Keep employees engaged and valued*
 - Most whistleblowers do not feel valued and believe their concerns have not been treated with respect – HR 101
- *Deal Effectively with the “Fox in the Hen House”*