

Doing Business in Regulation Rich California

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Agenda: Doing Business In California

- Nuances of the California FCA
- Investigation Developments
- Procurement Issues When Contracting with the State of California
- New Developments in California Environmental Law
- Complying with California Labor and Employment Requirements

Nuances of the California FCA

California Whistleblower Statute

- Amendments to California's general whistleblower statute (Cal. Lab. Code section 1102.5)
 - Whistleblower protections extended:
 - to employees who disclose to a person with authority over the employee
 - to employees who disclose to other employees with the authority to investigate or correct the violation
 - to instances of anticipatory retaliation

California False Claims Act

- California Adopts Implied Certification Theory
 - *San Francisco United School District ex rel Contreras v. First Student, Inc.*, 224 Cal. App. 4th 627 (2014)
 - Holding: “a vendor impliedly certifies compliance with express contractual requirements when it bills a public agency for providing goods or services.”

California False Claims Act (cont'd)

- Reducing Exposure to California FCA suits
 - Compliance program
 - Continuous employee training
 - Regularly audit business activities
 - Investigate whistleblower complaints

Investigation Developments

In re Kellogg Brown & Root, Inc. (Barko I)

756 F.3d 754 (D.C. Cir. 2014)

- District Court: internal investigation not privileged
 - Investigation “undertaken pursuant to regulatory law and corporate policy”
 - Conducted by in-house counsel only
 - Non-attorney interviewers
 - Interviewees not told that the purpose was to assist the company in providing legal advice

In re Kellogg Brown & Root, Inc. (Barko I)

756 F.3d 754 (D.C. Cir. 2014)

- D.C. Circuit: internal investigations are privileged
 - But-for test rejected; “one of the significant purposes” was to obtain or provide legal advice
 - Outside counsel are not “a necessary predicate”
 - Communications by and to non-attorneys serving as agents of attorneys are routinely protected
 - No “magic words” necessary to tell employees in order to gain the benefit of the privilege

U.S. ex rel. Barko v. KBR (Barko II)

- On remand, District Court found waiver through statements made by KBR's counsel during discovery and at summary judgment:
 - The shield becomes a sword
 - Rule 612
 - Fact work product + substantial need
- All arguments rejected by D.C. Circuit in August 2015

Barko – Lessons Learned

- *Barko I*
 - Attorney-client privilege is alive and well
 - Make clear what your purposes are

- *Barko II*
 - Delineate the role of attorney agents
 - Keep your sword in its sheath
 - Minimize privileged deponent prep materials

Other Privilege Cases of Interest

- Wal-Mart
 - *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264 (Del. 2014)
- Bank of China
 - *Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479 (S.D.N.Y. 2013)
- Penn State
 - *Paterno v. NCAA*, No. 2013-2082

***Barko* – Securities & Exchange Commission**

Original provision:

- “I understand that in order to protect the integrity of this review, **I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview**, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment” (emphasis added)

***Barko* – Securities & Exchange Commission**

- Cease and Desist Order
 - Pursuant to settlement offer, no admissions
 - Rule 21F-17 “No person may take any action to impede”
 - SEC unaware of any actual issues with KBR
 - KBR amended the confidentiality statement
 - KBR to contact former employees, provide evidence
 - \$130,000 penalty

***Barko* – Securities & Exchange Commission**

- Issues of note
 - SEC settlement
 - Signed confidentiality statements
 - Upjohn and maintaining privilege

***Barko* – SEC Lessons Learned**

- Review existing policies to assess potential risk
- Consider using carve-out language
 - Nothing in this agreement shall prohibit you from communicating directly with...
- Consider affirmative language noting no obligation for prior counsel approval (or anyone else in the company)

Procurement Issues When Contracting with California

California State Procurement

CPRA & Proprietary Information

- No Express Exemption for Trade Secrets
 - Cal. Gov't Code § 6254(k):
 - “Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.”
 - Cal. Evid. Code § 1060
 - Record must meet the definition of a trade secret.
 - “[T]he owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.” (emphasis added)

California State Procurement (cont'd)

Treatment of Contractor Bids

- Bids and resulting contracts are generally disclosable after bids have been opened or the contract is awarded. Public Contract Code §§ 10305, 10342.
- State Contracting Manual
 - “Although a rejected bid may have pages marked ‘Confidential’ or ‘Proprietary,’ the bid is a public record subject to release in response to a public records request. In order to prevent the release of bid documents that are marked ‘confidential’ or ‘proprietary,’ the bidder must obtain a court order enjoining the state from release of the document.”

California State Procurement (cont'd)

Practice Pointers

- Identify and mark proprietary information and trade secrets
- Understand what state agencies consider to be releasable
- Negotiate notification into contract



New Requirements in California Environmental Law

California Environmental Law

- **SB 350 - Clean Energy and Pollution Reduction Act of 2015**
 - 50% of Electricity Generated Per Year from Renewable Resources by Dec. 31, 2030
 - 50% Reduction In Petroleum Use by Motor Vehicles by Jan. 1, 2030
 - Double Energy Efficiency in Buildings by Jan. 1, 2030
- **SB 32 - California Global Warming Solutions Act of 2006: Emissions Limit**
 - Current: Reduce GHG emissions by approx. 15% from 1990 level by 2020.
 - Update: Reduce GHG emissions to 80% of 1990 level by 2050

California Environmental Law (cont'd)

- Governor Brown continues to push hard on climate initiatives
 - Executive Order B-30-15 – issued April 29, 2015
 - GHG reduction target of 40% below 1990 levels by 2030
- Federal involvement under review
 - *FERC v. Electric Power Supply Association* (US Supreme Court granted cert. May 4, 2015)

Complying with California Labor and Employment Requirements

Labor and Employment – 2014/2015

Case Developments

- *Cochran v. Schwan's Home Services, Inc.*, 228 Cal.App. 4th 1137 (2014)
 - Personal cell phone reimbursement
- *Iskanian v. CLS Transportation*, 59 Cal.4th 348 (2014)
 - Class action waivers in arbitration agreements
 - Does not apply to PAGA claims

Labor and Employment – 2014/2015

Case Developments

- *United States v. Christensen*, No. 08-50531, 2015 WL 5010591 (9th Cir. Aug. 25, 2015)
 - Employees who misuse their access to their employers' computer systems can be held criminally liable under California Penal Code § 502(c)(2)
- *Escriba v. Foster Poultry Farms* (9th Cir. 2014)
 - Employee can affirmatively decline to use Family & Medical Leave Act (FMLA) leave

Questions?

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