

Third Thursday Briefing:
Whistleblowers – What You Should Know

June 19, 2014

The webinar will begin shortly. You will not hear any audio until we begin. Please stand by.

Today's Presenters



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Agenda

- Recent Developments
- Fostering an Ethical Culture
- Responding to Whistleblower Concerns
- Handling a Whistleblower
- Questions and Discussion

Recent Developments

Recent Developments

- SOX
 - *Lawson v. FMR, LLC* -- Supreme Court expands SOX protections to private contractors of publicly-traded companies
- Dodd-Frank
 - Courts split over whether internal reports of wrongdoing are protected
 - SEC issued first whistleblower retaliation enforcement action this week
 - SEC issued first bounty payment for 2014 -- \$875,000

Fostering an Ethical Culture

Whistleblower Statistics Reflecting Culture

- 41 percent of all U.S. workers claimed to have witnessed misconduct
- 63 percent of employees who observe misconduct now report it
- 92 percent of first reports of misconduct are made inside the company
- 21 percent of reporting employees complain of retaliation
- 34 percent of employees think their companies have a weak ethics culture

Creating an Ethical Culture

- Compliant v. Ethical – Messaging Matters
- Tone at the top and implementation at all levels
 - Requires integration across different functions
- Assess and adjust
 - Surveys of employees
 - Audits of practices
- Communicate regularly about ethics

Creating an Ethical Culture

- Regular training at all levels
 - Tailor training by level of employee
 - Identify and target specific divisions/groups most susceptible to potential violations
- Incentives for reporting concerns?
- Obtain confirmation from employees (annually and on departure) that they have disclosed ethics complaints/illegal activities

Reporting Systems for an Ethical Culture

- Collecting, tracking, investigating, and responding to complaints is paramount
 - Simplify reporting avenues for employees
 - Integrated tracking systems are essential
 - Must investigate and respond to all complaints
 - Must take steps to ensure no retaliation
- Analyze trends in complaints received
- Self-reporting protocols

Responding to Concerns

Internal Investigations - Triggers

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

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

Devising Investigation Strategies that Meet the Need

- Why?
 - Determine what we trying to accomplish with this investigation
- Who?
 - Identify best investigative team
- How?
 - Establish the process
- When?
 - When to take action

Waiver

- Waiver of the Attorney-Client Privilege or Work Product Protections
 - When is a waiver likely to occur?
 - Best practices to protect against waiver?

Witness Interviews

- Stress “Confidentiality” and Provide Non-Retaliation Pledge
- Clarify investigator’s role
- Create outlines and prepare summaries
- Assess credibility
- Open-ended, non-leading questions
- Time is of the essence

Interviewing the Whistleblower

- Determine who and when
 - HR/Internal investigator/Outside counsel?
 - At outset of investigation/after fact gathering/never?
- What to do if the whistleblower won't participate

Investigation Conclusion

- Take (and communicate) *some* action
- Consider appropriate changes to policy/practice
- Reiterate non-retaliation

Handling a Whistleblower

Retaliation - Adverse Employment Action

- Certain actions are obviously adverse
 - Discharge
 - Demotion
 - Reduction in pay/benefits
- *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006)
 - Range of employment actions prohibited by Title VII anti-retaliation provisions broader than anti-discrimination provisions
 - Beyond “ultimate employment decisions”
 - All conduct that would “dissuade a reasonable worker” from engaging in protected activity

Adverse Employment Action - Examples

- Transfer to different office
- Reduction in responsibilities
- Denial of leave/vacation requests
- Denial of opportunity for overtime
- Negative, or less positive, performance evaluations
- Failure to select employee for participation in a management training program
- Exclusion from meetings/email lists

Keep it Confidential

- Retaliation depends on cause and effect - whistleblowing caused the adverse job action
- A manager cannot retaliate against a whistleblower if he/she never knew the employee blew the whistle...
- Let managers know only if they need to know

Timing is Critical

- Timing of Appropriate Action is Critical
 - Again, retaliation is about cause and effect
 - Courts differ on how long is “long enough” after whistleblowing to break causation
 - Some courts have held that three months is long enough to break the causal link between whistleblowing and job action; a year is almost always long enough
 - Continuation of discipline that started before whistleblowing is not retaliation

Take Appropriate Action . . . Carefully

- Consider all remedial options
 - Typically a range of potential actions
 - Consider which actions a jury would think were appropriate
- Ensure consistency of remedial actions taken in prior similar cases
- Performance management versus avoiding retaliation claims – the rubber meets the road

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