Morgan Lewis

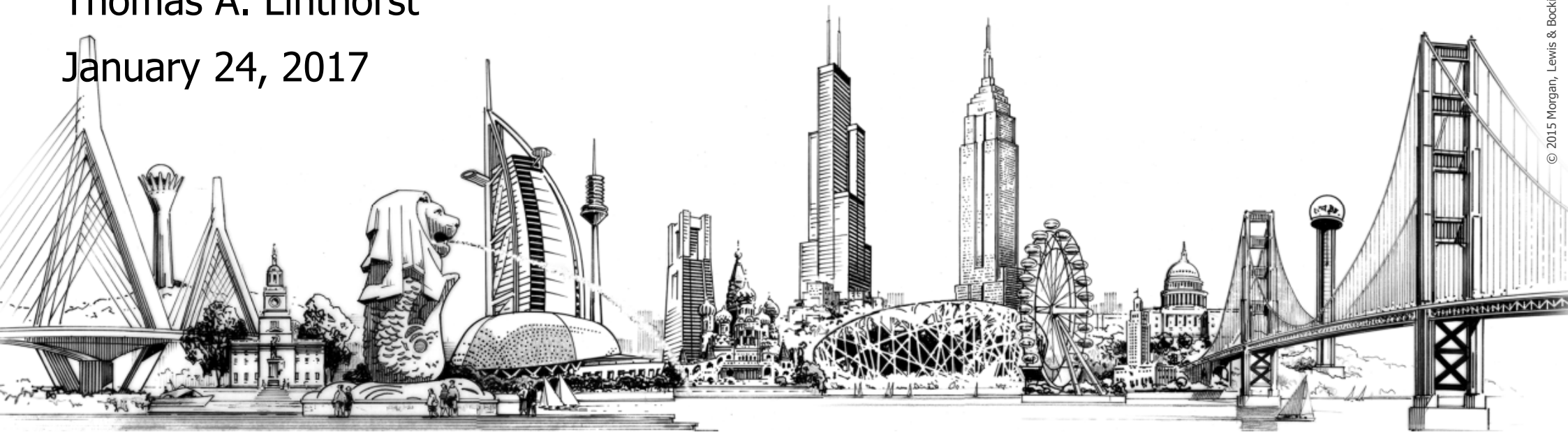
WHISTLEBLOWER RETALIATION CLAIMS:

2016 REVIEW AND WHAT TO EXPECT FOR 2017

Sarah E. Bouchard

Thomas A. Linthorst

January 24, 2017



Recent Developments in Preventing and Defending Whistleblower Claims

- Preview
  - 2016 Annual SEC Program Report
  - Whistleblower Award Program Incentives
  - Recent Developments
  - Whistleblowers in the Era of Trump
  - Practical Implications
  - Appendix

2016 Annual SEC Whistleblower Program Report: The Numbers

- The SEC received 4,218 whistleblower tips in FY 2016, a 7% increase from FY 2015.
  - This was a relatively small increase considering that the SEC released that it had paid more than $37 million to eight whistleblowers in FY 2015.
- For each fiscal year that the whistleblower program has been in operation, the SEC has received an increasing number of tips.

FY2011[50]	FY2012	FY2013	FY2014	FY2015	FY2016
334	3,001	3,238	3,620	3,923	4,218[51]

- Since August 2011, the SEC has received 18,334 tips.

2016 Annual SEC Whistleblower Program Report: The Numbers

- Whistleblowers are asked to identify the nature of their complaint allegations.

- In 2016, the most common complaint categories were:
  - Corporate Disclosures and Financials (22%)
  - Offering Fraud (15%)
  - Manipulation (11%)

- Since the beginning of the program, Corporate Disclosures and Financials, Offering Fraud, and Manipulation have consistently ranked as the three top allegation categories.

2016 Annual SEC Whistleblower Program Report: The Numbers

- In FY 2016, the SEC issued whistleblower awards totaling more than $57 million to 13 whistleblowers.
  - Highest award exceeded $20 million
- Enforcement actions from whistleblower tips have resulted in more than $874 million in financial remedies.
- Six of the ten biggest whistleblower awards ever were issued by the SEC in FY 2016.
- The SEC has awarded more than $130 million to 37 whistleblowers since the program's inception.

2016 Annual SEC Whistleblower Program Report: The Numbers

- Geographic Origin
  - For FY 2016, the SEC received whistleblower tips from a combination of 50 states and territories.
    - Largest number of whistleblower tips came from California.
  - Since the beginning of the whistleblower program, the OWB has received tips from individuals in foreign countries.
    - For FY 2016, the SEC received whistleblower tips from individuals in 67 foreign countries.
      - Largest number of these whistleblower tips came from Canada.

Whistleblower Award Program Incentives

- The program creates incentives for individuals who report possible violations of the federal securities laws to the SEC by rewarding individuals for credible tips that lead to successful enforcement actions.
- Those providing "original information" leading to sanctions of more than $1 million will receive an award of **10% – 30%** of the penalty imposed.
- Qualifications for an award under the whistleblower rules:
  - Information supplied must be "original";
  - Information must be provided on a voluntary basis;
  - Information must lead to a successful enforcement action that results in a monetary award of more than $1 million.
- Reporting can be direct, anonymous, or through counsel, and reporters can benefit even if they participated in underlying conduct—so long as they are not convicted of a crime.

Whistleblower Award Program Incentives

- Individuals whose principal duties involve compliance or internal audit responsibilities—such as officers, directors, trustees and partners who learn about misconduct through another employee's reporting — generally are excluded from award eligibility unless one of three exceptions applies:
  - If a person is engaged in conduct that interferes with an SEC investigation;
  - If the person is aware that the company is engaged in, or intends to engage in, conduct that will cause significant, long-term damages to the company or shareholders (i.e., the exception intends to prevent a $10 million problem from becoming a $100 million problem);
  - If misconduct is reported internally, and after 120 days an individual officer, director, or compliance professional believes that nothing has been done to correct the misconduct, that person can report the alleged violation to the SEC.

Recent Developments: Notable Awards

- Jan. 15, 2016 – The SEC announced an award of more than $700,000 to a "company outsider" who conducted a detailed analysis that led to a successful SEC enforcement action.

- May 13, 2016 – The SEC announced an award of more than $3.5 million to a company employee.
  - Tip "substantially strengthened" an ongoing SEC investigation with additional evidence of wrongdoing.
    - Increased SEC's leverage during settlement negotiations.

- Aug. 30, 2016 – The SEC announced an award of more than $22 million to a "company insider" who reported fraud. This award marks the second-highest award issued under the whistleblower program.

Recent Developments: Notable Awards

- Nov. 4, 2016 – The SEC announced an award of more than $325,000 to a former employee of an investment firm for providing "specific and detailed" information that caused an investigation to be opened.
  - Identified individuals responsible and descriptively detailed the misconduct.
  - Unreasonable delay of initial report resulted in decreased award.

- Nov. 14, 2016 – The SEC announced an award of more than $20 million.
  - SEC claims that the "prompt" tip enabled it to "move quickly" and commence an enforcement action before the wrongdoers could "squander" the money.

- Dec. 5, 2016 – The SEC announced an award of approximately $3.5 million to an individual whose tip led to an SEC enforcement action.

Recent Developments: Confidentiality Provisions in Policies and Agreements

- The SEC continues to focus on confidentiality and nondisclosure provisions in employment, separation, and settlement agreements and related policies that the commission believes may stifle employees reporting to the SEC.
  - SEC Rule 21F-17 prohibits "any action to impede an individual from communicating directly with the [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement."

Recent Developments: Confidentiality Provisions in Policies and Agreements

SEC approved order for severance agreements to include the following: "Employee understands that nothing contained in this Agreement limits Employee's ability to file a charge or complaint with the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, the Securities and Exchange Commission or any other federal, state or local governmental agency or commission ("Government Agencies"). Employee further understands that this Agreement does not limit Employee's ability to communicate with any Government Agencies or otherwise participate in any investigation or proceeding that may be conducted by any Government Agency, including providing documents or other information, without notice to the Company. This Agreement does not limit Employee's right to receive an award for information provided to any Government Agencies."

Recent Developments: Confidentiality Provisions in Policies and Agreements

SEC approved order for severance agreements to remove the following: "nothing in this Release precludes Employee from participating in any investigation or proceeding before any federal or state agency or governmental body . . . however, while Employee may file a charge, provide information, or participate in any investigation or proceeding, by signing this Release, Employee, to the maximum extent permitted by law . . . **waives any right to any individual monetary recovery . . . in any proceeding brought based on any communication by Employee to any federal, state or local government agency or department**."

SEC approved order that non-disparagement clause include the following: "In addition, nothing herein prohibits me from communicating, without notice to or approval by [Company], with any federal government agency about a potential violation of a federal law or regulation."

OSHA's New Policy Guidelines for Whistleblower Releases

On September 15, 2016, OSHA announced new guidelines for approving settlement agreements in whistleblower actions pending before OSHA.

- OSHA outlined several factors it will consider when determining whether a settlement agreement and, in particular, a confidentiality or nondisparagement provision "impermissibly restricts or discourages protected activity." Such factors include whether the agreement:
  - "restricts the complainant's ability to provide information to the government, participate in investigations, file a complaint, or testify in proceedings based on a respondent's past or future conduct";
  - "requires a complainant to notify his or her employer before filing a complaint or voluntarily communicating with the government regarding the employer's past or future conduct";
  - "requires a complainant to affirm that he or she has not previously provided information to the government or engaged in other protected activity, or to disclaim any knowledge that the employer has violated the law"; and
  - "requires a complainant to waive his or her right to receive a monetary award (sometimes referred to in settlement agreements as a "reward") from a government-administered whistleblower award program for providing information to a government agency."
- Liquidated damages provisions also will be scrutinized where "disproportionate" to anticipated loss upon a breach or where exceeding the relief requested in the complaint.
- Overbroad confidentiality/nondisparagement provisions will not be saved by a general statement that they apply "except as provided by law."

OSHA's New Policy Guidelines for Whistleblower Releases (Cont'd)

OSHA will require that offending language be removed and/or the following be "prominently positioned":

> **Nothing in this Agreement is intended to or shall prevent, impede or interfere with complainant's non-waivable right, without prior notice to Respondent, to provide information to the government, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a government-administered whistleblower award program for providing information directly to a government agency.**

Recent Developments: Confidentiality Provisions in Policies and Agreements

- Dec. 20, 2016 – SandRidge Energy, Inc. agreed to settle charges with the SEC that it used "illegal" separation agreements and retaliated against a whistleblower who expressed concerns internally regarding how the company's reserves were calculated.

- SEC order found that SandRidge conducted multiple reviews of its separation agreements, yet continued to use language that prohibited employees from participating in any government investigation or disclosing information potentially harmful or embarrassing to the company.

- According to the Chief of OWB, this case marked "the first time a company [was] charged for retaliating against an internal whistleblower, **and the second enforcement action this week** against a company for impeding employees from communicating with the SEC."

- SandRidge did not admit or deny SEC findings, and paid a $1.4 million penalty.

Summary: SEC Enforcement Actions on Whistleblower Releases

- Employers should review agreements and policies relating to confidentiality, nondisparagement, covenants not to sue, internal reporting, release of claims, and other provisions that the SEC or OSHA may claim chill external reporting.
  - Overbroad provisions regarding confidentiality and nondisparagement;
  - Overbroad provisions claiming that although the individual retains the right to file a charge or communicate with agencies, he or she waives all monetary relief.

Recent Developments: The Definition of "Whistleblower" under Dodd-Frank's Whistleblower-Protection Provision

- **Narrow View**
  - To be a "whistleblower" under the SEC whistleblower program, an employee must provide information relating to a violation of the securities laws **to the SEC**.
  - *Asadi v. G.E. Energy (USA) LLC*, 720 F.3d 620 (5th Cir. 2013)
- **Broad View**
  - An employee need not report the alleged misconduct to the SEC to be considered a whistleblower.
  - *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 153-155 (2d Cir. 2015)

- The Fifth and Second Circuits have reached different results.

Recent Developments: The Definition of "Whistleblower" under Dodd-Frank's Whistleblower-Protection Provision

- In *John Verble v. Morgan Stanley Smith Barney, et al.*, --- F. App'x ----, 2017 WL 129040 (6th Cir. Jan. 13, 2017), the Sixth Circuit declined to reach the issue.
- The district court dismissed Plaintiff's complaint, finding that Plaintiff was not a whistleblower under the Dodd-Frank Act because he reported his allegations **to the FBI**, not the SEC.
- The Sixth Circuit affirmed, **BUT** on other grounds:
  - "Because Verble's claim suffers from a more fundamental defect, we do not reach this question."
    - Verble did not allege sufficient facts regarding his Dodd-Frank retaliation claim:
      - Provided no factual information about his alleged cooperation with the SEC or FBI;
      - Provided no details regarding his claims of "insider trading";
      - Offered a list of third party names, but these names could be pulled from the court's public docket because they had pleaded guilty to fraud–related charges in a separate matter.

Recent Developments: Report of Potential for Fraud Not Covered Under SOX

- In *Kantin v. Metropolitan Life Ins. Co.*, No. 13 CV 8925, 2016 WL 1020988 (S.D.N.Y. Mar. 14, 2016), the court granted summary judgment on all of Plaintiff's claims where Plaintiff failed to offer evidence that he believed that unlawful activity was actually occurring or was likely to occur.
  - Plaintiff alleged that he was terminated by MetLife after engaging in protected whistleblower activity as protected by Section 806 of the Sarbanes-Oxley Act (SOX).
  - Plaintiff raised concerns internally that a certain life insurance product of MetLife's was based on improperly priced component "cells."
    - While employed, Plaintiff did not tell supervisors that he believed that the pricing was illegal.
    - Plaintiff made only one allegation relating to activity that he believed was unlawful, and he failed to communicate that belief until his deposition was taken.

Recent Developments: Report of Potential for Fraud Not Covered Under SOX

- The Court rejected Plaintiff's claims:
  - "Absent evidence that [Plaintiff] believed that some unlawful activity was actually occurring or was likely to occur, his claims do not fall under the protection of SOX."
  - Mere potential for fraud or unlawful activity is not covered by the plain language of SOX.
    - "The protections of Section 806 do not extend to allegations of … speculative future contingenc[ies]."
- The Court also found that his claims could not establish fraud, falling short of showing criminal activity:
  - "Given the size of the [life insurance] product as a whole relative to MetLife's overall business, a small aberration in one … cell's possible profitability is … plainly immaterial … ."
- **Key Takeaways**:
  - Materiality.
  - *Potential* for fraud or unlawful activity is insufficient.

Recent Developments: Eighth Circuit Adopts *Sylvester* Standard

- In *Beacom v. Oracle America, Inc.*, 825 F.2d 376 (8th Cir. 2016), the Eighth Circuit affirmed a grant of summary judgment where Plaintiff failed to show that he held a "reasonable belief" that his employer engaged in fraud on shareholders.
- The Eighth Circuit joined the Second, Third, and Sixth Circuits in adopting the Administrative Review Board's (ARB's) "reasonable belief" standard first recognized in *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 WL 2165854 (ARB May 25, 2011) (en banc).
  - To satisfy the objective component of the *Sylvester* Standard:
    - Employee must show that a reasonable person in the same factual circumstances with the same training and experience would believe that the employer violated securities law.
      - An employee's **mistaken** belief may still be objectively reasonable.

Recent Developments: Eighth Circuit Adopts *Sylvester* Standard

- In affirming summary judgment in favor of the employer, the Court reasoned that Plaintiff, a vice president of sales, could not have held a reasonable belief that "[m]issing a revenue forecast by less than four hundredths of a percent of total revenue" violated securities laws.
  - The Court further reasoned that "$10 million is a minor discrepancy to a company that annually generates billions of dollars."

- **Key Takeaways**:
  - Even the less-stringent "reasonable belief" standard has its limits.
  - An employee may lack a reasonable belief that a securities violation has occurred where his claims are based on *de minimis* amounts that are immaterial to shareholders.
  - Examine the bigger corporate picture.

Recent Developments: Appropriate Standard for *Prima Facie* Case Under Dodd-Frank

- In *Hall v. Teva Pharmaceutical USA Inc.*, --- F. Supp. 3d ----, 2016 WL 5661630 (S.D. Fla. Sept. 30, 2016), a district court adopted Title VII analysis for establishing retaliation under Dodd-Frank.

- The Court recognized a dearth of authority on how to establish a *prima facie* case of retaliation under Dodd-Frank.

- Adopts Title VII standard, whereby a plaintiff must show:
  - Plaintiff engaged in a protected activity
  - Plaintiff suffered a materially adverse employment action
  - The adverse action was causally connected to the protected activity.

Recent Developments: Appropriate Standard for *Prima Facie* Case Under Dodd-Frank

- The Court held that the employee failed to meet her burden in establishing her *prima facie* case because she could not establish causation:
  - Significant time elapsed between Teva's knowledge of protected activity and the adverse employment action.
  - Intervening event of misconduct broke the causal chain:
    - Moonlighting and using company resources.
    - "This anonymous tip, and the subsequent … investigation uncovering Plaintiff's purported misconduct serves to sever any causal connection that may have been established by Plaintiff through a pattern of antagonism."
- **Key Takeaways** from *Hall*:
  - Compliance officers can be whistleblowers.
  - Summary judgment can be won on causation.
    - Time lines are important.
    - Intervening acts of misconduct can break a causal link between the protected conduct and the adverse employment action.
      - Be thorough in conducting discovery.

Recent Developments: In-House Counsel Whistleblowers

- In *Wadler v. Bio-Rad Laboratories, Inc.*, --- F. Supp. 3d ----, 2016 WL 7369246 (N.D. Cal. Dec. 20, 2016), a California federal court **denied** a defense motion to exclude evidence of, among other things, "all testimony that may be based on information [Plaintiff] learned in the course of [whistleblower's] service as Bio-Rad's general counsel."
  - The motion constituted a dispositive motion that should have been filed by the dispositive motion deadline.
  - Rejected Bio-Rad's characterization of the motion to exclude evidence as a "garden variety" motion in limine.
- After denying the motion as untimely, the Court proceeded to address the remaining arguments of the parties on the merits:
  - Bio-Rad waived attorney-client privilege due to its "open and aggressive approach" to the litigation.
  - Attorneys are persons under SOX; they may bring claims.
    - No per se bar to in-house counsel bringing whistleblower claims.

Recent Developments: In-House Counsel Whistleblowers

- The Court rejects Bio-Rad's claim that CA limitations on in-house attorney retaliation claims (brought under CA state tort law) apply where the underlying claims are brought under federal statutes such as SOX and Dodd-Frank.
  - Looks to federal common law for guidance.

- Finds SOX preempts CA ethical rules that prevent Plaintiff from disclosing client confidences in this context.
  - "[A]n ethical rule that deprives an attorney of [retaliation] protection interferes with the methods by which Sarbanes-Oxley was designed to achieve its objective. In other words, this is a textbook example of obstacle preemption" (internal quotations omitted).

- **Key Takeaways from *Bio-Rad***:
  - When defending against an in-house counsel whistleblower, a litigation strategy of openness/transparency may result in waiver of attorney-client privilege.
    - Take sufficient steps to guard the privilege:
      - Object to public filings of plaintiffs that contain privileged or confidential information
      - File appropriate documents under seal
      - Request protective measures from the Court to guard privileged or confidential information
  - State ethics rules that prevent in-house counsel from reporting alleged violations on the basis of guarding the attorney-client privilege may yield to SOX.

Recent Developments: Extraterritorial Application of Dodd-Frank

- Courts have found that the plain language of Dodd-Frank does not evidence that Congress meant for the anti-retaliation provision to apply extraterritorially.

- Whether a retaliation claim is domestic or extraterritorial is based on a case-by-case approach. However, "simply alleging that some domestic conduct occurred cannot support a claim of domestic application because it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 180 (2d Cir. 2014).

- In 2015 and 2016, no district courts provided additional guidance regarding the extraterritorial application of Dodd-Frank's anti-retaliation protections.

Recent Developments: OSHA's More Lenient Standard for Whistleblower Investigations

- Jan. 28, 2016 – The US Department of Labor issued an OSHA Instruction, implementing the OSHA Whistleblower Investigations Manual. *See* CPL 02-03-007.
  - The Manual explains that OSHA will make a "reasonable cause" determination prior to a hearing to determine whether a violation of a whistleblower statute occurred.
  - According to the Manual, the "reasonable cause" standard is "somewhat lower" than the preponderance of the evidence standard. The standard during OSHA investigations is that a "reasonable judge could believe a violation occurred" (emphasis added).

Whistleblowers in the Era of Trump

- During the campaign, President Trump vowed to "get rid of" Dodd-Frank.
- His staff now promises to "dismantle" the law.
- But the whistleblower provision has key Republican allies:
  - "Information provided by whistleblowers under the [SEC] whistleblower program has brought in more than $584 million in financial sanctions. … As I have done for each president since taking office, I call on President Trump to hold a Rose Garden ceremony honoring whistleblowers."
    - Sen. Chuck Grassley (R-IA) (Finance Committee) (Dec. 9, 2016).
  - And in the House of Representatives, Rep. Jeb Hensarling (R-TX) (Chair, Financial Services Committee) has also voiced support for whistleblower programs.
    - Introduced the Financial Choice Act in September, a proposal that provides an "off-ramp" for major parts of Dodd-Frank but makes no mention of ending the whistleblower program.
- Even if Dodd-Frank is dismantled, it is likely that the whistleblower program will be spared.

Whistleblowers in the Era of Trump

- What about SOX?
  - Unlike Dodd-Frank, SOX was generally spared criticism by President Trump.
- Changes to whistleblower program could be effected via appointment power:
  - ARB presently comprised of 4 members (including 1 chair).
    - Up to 5 members
    - Members of the ARB are appointed by the Secretary of Labor.
  - On Dec. 8, 2016, President Trump nominated Andrew Puzder as Labor Secretary.
    - CEO of CKE Restaurants, parent company of Carl's Jr., Hardee's, and Green Burrito.
      - Likely to favor management over labor.
    - Power to appoint judges to ARB that are more favorable to employers.
    - Power to revise OSHA Manual to heighten standard necessary to prove retaliation.

Practical Implications: Recognizing Whistleblower Issues

- Be alert for any issue that relates to:
  - Sales practices, potential violations of law, FINRA rules or reporting obligations, or internal controls that implicate SEC rules and regulations;
  - Accounting, bookkeeping, and/or recording;
  - Potential violations of the employer's corporate compliance, code of conduct, or ethics program; and
  - Mail or wire fraud.
- Consider the protected status of an employee who takes confidential documents or information.
- Consider reports to agencies other than the SEC or federal criminal authorities.
- Employee relations issues often mask broader issues.
- Employees facing investigation or discipline are encouraged to report issues that may protect them as whistleblowers.

Presenters

Sarah E. Bouchard
Partner | Philadelphia
+1.215.963.5077
sbouchard@morganlewis.com

Thomas A. Linthorst
Partner | Princeton
+1.609.919.6642
tlinthorst@morganlewis.com

APPENDIX

SOX at a Glance

- **18 U.S.C. § 1514A:** Protects an employee from retaliation because of any lawful act done by the employee:
  - To provide information or otherwise assist in an investigation regarding conduct that the employee reasonably believes constitutes mail, wire, bank, or securities fraud, or a violation of any SEC rule or regulation or of any federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by:
    - a federal regulatory or law enforcement agency;
    - a member or committee of Congress; or
    - a person with supervisory authority over the employee (or such other person working for the employer with authority to investigate, discover, or terminate misconduct).
  - To file, testify in, participate in, or assist in a proceeding filed or about to be filed relating to an alleged violation of the laws listed above.

Dodd-Frank at a Glance

- Created three new stand-alone whistleblower programs:
  - SEC Program; Commodity Futures Trading Commission (CFTC) Program; Consumer Finance Program.
- Strong antiretaliation provisions — no retaliation against whistleblowers who:
  - Provide information to SEC or CFTC pursuant to these new programs;
  - Initiate, testify, or assist in an investigation or judicial or administrative action based on or related to such information; or
  - Make disclosures that are required or protected under SOX.
- SEC whistleblowers may sue directly in federal court without exhausting administrative remedies—new SEC whistleblower cause of action was created.
  - Expanded the statute of limitations to six years or three years from the date when the material fact was known/should have been known.
  - Remedies: double back pay, reinstatement, attorney/expert fees.

Dodd-Frank at a Glance (Cont.)

- Dodd-Frank also amended SOX to:
  - Expand coverage to affiliates included in consolidated financial statements;
  - Provide a right to jury trial;
  - Expand statute of limitations from 90 to 180 days;
  - Prohibit predispute arbitration agreements covering SOX claims; and
  - Provide no waiver of SOX rights and remedies by agreement.

Dodd-Frank Whistleblower-Protection Provision

- "Whistleblower" means any individual who provides **information relating to a violation of the securities laws to the SEC**, in a manner established, by rule or regulation, by the Commission.
- "No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
  - In providing information to the Commission in accordance with this section;
  - In initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
  - **In making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002** . . . , this chapter . . . , and any other law, rule, or regulation subject to the jurisdiction of the Commission."

More Whistleblower Programs: The Federal False Claims Act (FCA)

- Among other things, the FCA prohibits a person from:
  - knowingly presenting, or causing to present, a **false** or **fraudulent** claim for payment to the US Government;
  - making or using a **false** record or statement material to a **false** or **fraudulent** claim; or
  - intentionally defrauding the government by submitting a claim without completely knowing that the information contained in the claim is true.

FCA: A Powerful Enforcement Tool

- Who may be liable:
  - Individuals, corporations, nonprofit associations, professional societies, and local governments
- Who may bring an action:
  - DOJ (Civil Fraud Section; AUSA offices)
  - Private individuals, subject to public disclosure bar
- Potential sanctions:
  - Civil penalties of $5,500–$11,000 per claim plus **three** times the amount of damages that the government sustains
  - AKS violations and other regulatory violations may constitute a violation of the FCA under recent reform provisions in the Affordable Care Act (ACA)

Whistleblower Protection: FCA (31 U.S.C. § 3730(h))

Who is Protected?	Employees, contractors, or agents
What is Protected?	Lawful acts in furtherance of bringing an FCA action ***or*** other efforts to stop one or more violations of the FCA
What is Prohibited?	Discharges, demotions, suspensions, threats, harassment, or any other manner of discrimination
Potential Damages?	• Reinstatement with the same seniority an individual would have had but for the discrimination • Two times back pay • Interest on back pay • Special damages, including litigation costs and attorney fees
Statute of Limitations	Within three years of the retaliation

FCA Whistleblower Protections

- Elements of a Retaliation Claim
  - Plaintiff must allege that he or she was engaged in a protected activity.
  - The employer must have had knowledge of the plaintiff's activity and had either explicit or implicit notice that the activity could result in an FCA complaint being filed.
  - Finally, the plaintiff must establish that the discrimination that he or she suffered was caused as a result of the protected activity.
    - For example, that the employer action was at least, in part, motivated by the plaintiff engaging in protected activity.

More Whistleblower Programs: Affordable Care Act (ACA)

- The ACA provides protection to employees against retaliation for:
  - reporting alleged violations of the ACA to the employer, the federal government, or the attorney general of a state;
  - testifying, assisting, or participating in any proceeding concerning an ACA violation;
  - objecting to or refusing to participate in any activity reasonably believed to be in violation of the ACA; or
  - receiving a federal health insurance income tax credit or a cost-sharing reduction when enrolling in a qualified health plan.
- Applies to private and public-sector employers.
- Complaints must be filed with OSHA within 180 days of the alleged violation.

More Whistleblower Programs: Food Safety and Modernization Act (FSMA)

- On June 6, 2013, the first whistleblower lawsuit was filed under the FSMA.
  - The FSMA includes "employee protection" whistleblower provisions aimed at ensuring that food safety concerns of food and beverage company employees are taken seriously.
  - To qualify as protected activity under the FSMA, an employee need only have an objectively reasonable belief that the practices were violating a provision of the Federal Food, Drug and Cosmetic Act or any rule, regulation, standard, or ban of the FDA—no actual violation is required.
  - Like SOX, the FSMA requires complainants to first file a complaint with OSHA. If OSHA does not issue a decision within 210 days of the filing of the complaint, the complainant can file a lawsuit in federal court. A complainant may also sue in federal court within 90 days of OSHA's determination.

More Whistleblower Programs: Consumer Fraud Protection Act (CFPA)

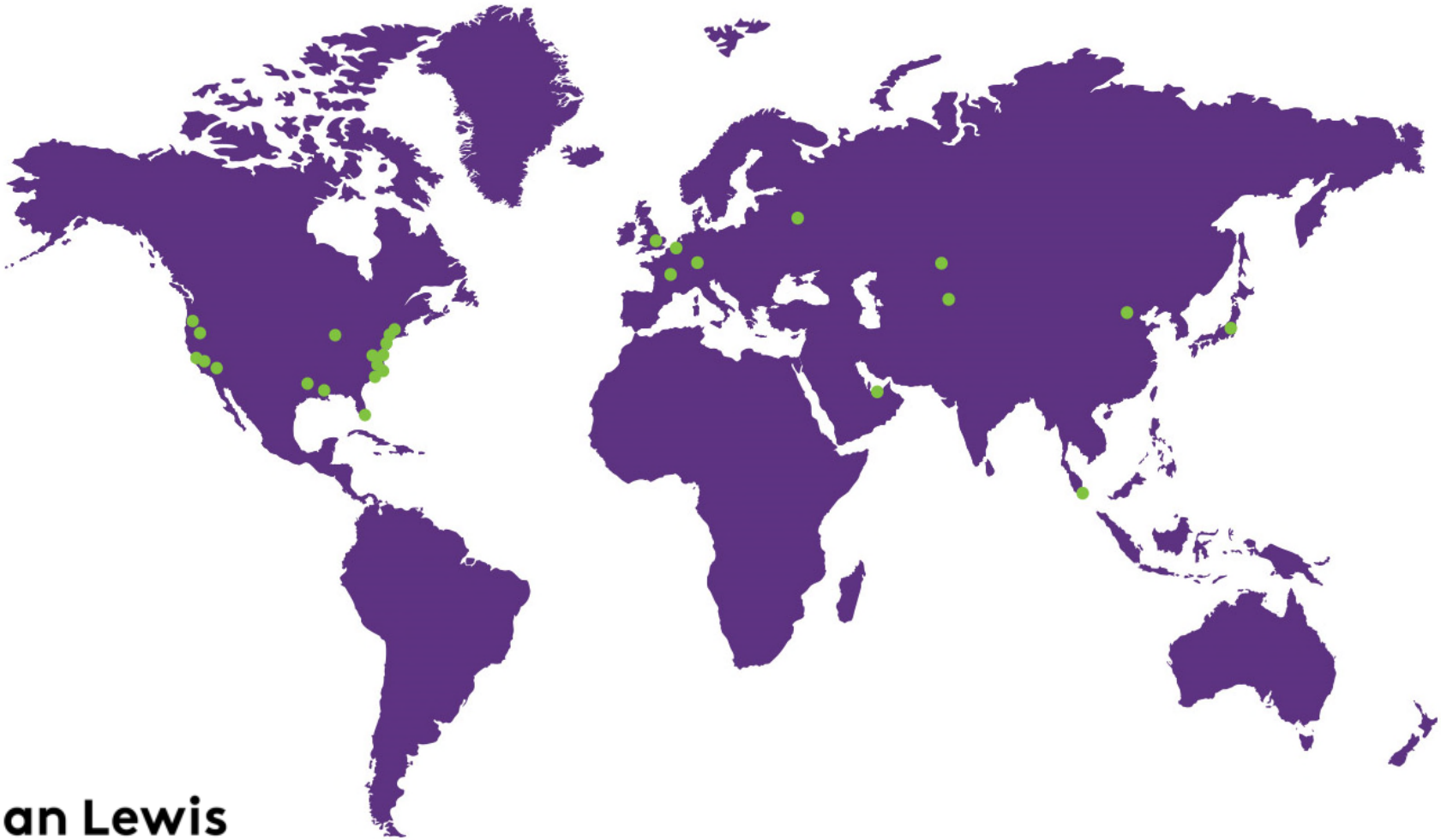
- Under the CFPA, employers may not terminate or discriminate against covered employees who provide information relating to any violation of or act or omission that the employee reasonably believes is a violation of any provision of the CFPA.
- The definition of "covered employee" does not include all employees of a covered person or service provider, but rather is limited to those individuals who are "performing tasks related to the offering or provision of a consumer finance product or service."
- For a complaint to qualify as a whistleblower under the CFPA, the "reasonable belief" standard, as applied to Section 806 of SOX, is used. Thus, the complainant must hold (1) a subjective, good-faith belief that the conduct complained of violated any provision of the CFPA or any other provision of law under the Consumer Financial Protection Bureau's (CFPB's) jurisdiction or any rule, order, standard, or prohibition prescribed by the CFPB, and (2) an objectively reasonable belief that the conduct violates one of the listed categories of law.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Almaty
Astana
Beijing
Boston
Brussels
Chicago
Dallas
Dubai
Frankfurt
Hartford
Houston
London
Los Angeles
Miami
Moscow
New York
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Santa Monica
Silicon Valley
Singapore
Tokyo
Washington, DC
Wilmington



Morgan Lewis

THANK YOU