A Littler Mendelson Report

InSight

An Analysis of Recent Developments & Trends

In This Issue:

October 2008

With fraud still an issue for many businesses worldwide, several new legal trends are emerging to encourage employees to report wrongdoing to their employers including expanded protections for whistleblowers and new retaliation claims.

International Legal Trends for Encouraging Employee Whistleblowing

By Eric A. Savage and Anita S. Vadgama

In a recent report, the International Chamber of Commerce's (ICC) Commission on Anti Corruption ("the Commission") offered its view that "fraud remains one of the most problematic issues for business worldwide, no matter the company's country of operation, industry sector or size."[1] Despite significant investment in controls to stem economic crime, companies are still reporting little or no noticeable return on their investment and a level of economic crime that has not significantly decreased.

Companies often find that part of the problem in addressing economic fraud is that they are unaware of it until the damage has been done. However, supported by a legal trend that views whistleblowing as a protected activity, some employers are encouraging their employees to engage in whistleblowing and alert the company to what an employee believes is fraud or other legal wrongdoing occurring in the workplace. Employers sometimes find that turning employees into a protected first line of defense against fraud is an effective way of detecting and preventing economic crime.

International conventions, domestic legislation and regulatory bodies have consistently recommended that companies implement fair and effective whistleblowing systems, through which employees can report their concerns to an appropriate person, in strict confidence and without fear of reprisal. Without adequate internal whistleblowing procedures, many employees allege that they have been reluctant to raise concerns about what they perceive to be illegal activity within their enterprises. Employees often fear not just reprisals from their managers, but also retaliation from their coworkers, often in the form of shunning.

Some countries have addressed this issue by passing whistleblowing legislation that expressly forbids retaliatory treatment against employees who, in good faith, raise legitimate concerns regarding legal wrongdoing in the workplace. But not all countries have done so. In those countries, companies unwilling or unable to offer employees sufficient reassurance that they will not face repercussions as a result of their disclosures may find employees less likely to reveal potential problems. A recent study performed by KPMG established that at least 25% of fraud incidents discovered in enterprises surveyed came to light as a result of a whistleblowing system that those companies had put in place.[2]

However, the practice of encouraging whistleblowing must be balanced against employers' concerns that employees will raise grievances about or question legitimate business

management or human resources decisions under the guise of whistleblowing. Employers regularly express concern that the complaints are made by employees with little or no legal understanding and only a vague sense that a particular decision or practice "doesn't seem right," or that the grievance has the specific intent of immunizing the complaining employee against discipline or termination for poor performance. Some countries have addressed this issue and specifically defined what protected disclosures qualify for protection under whistleblowing laws, in particular that disclosures be made in good faith and with a reasonable belief that the challenged practice violates a statute or legal rule. Nonetheless, and given developments in this area both in the United States and elsewhere, it is prudent that companies wishing to introduce a whistleblowing procedure ensure that those procedures are carefully defined to avoid them being manipulated by employees. Further, it should be made clear by employers that employees will face disciplinary action, including discharge, if they raise concerns in bad faith or deliberately outside the scope of the whistleblowing procedure. Therefore, while many employers can see the benefits of internal whistleblowing, those same employers may be understandably reluctant to open a potential floodgate to general complaints and grievances by their employees.

The Commission studied the correlation between whistleblowing and the level of economic fraud and concluded that whistleblowing can be an effective tool in lowering economic fraud. To that end, in July 2008 it issued recommended guidelines to help companies establish and implement effective internal whistleblowing procedures. The Commission expressed its belief that with fair and safe procedures for whistleblowers, more employees will come forward to report legal wrongdoing occurring in the workplace. This Insight briefly reviews international and some domestic sources of law on whistleblowing to illustrate the types of legislation that have been passed in the United States and abroad. It also sets out the ICC's guidelines in detail, and provides guidance on how public interest in encouraging whistleblowing can be balanced against the interests of the employer.

International Conventions

International Conventions are not legally enforceable without implementing domestic legislation and enforcement mechanisms. However, these Conventions provide a valuable guide to companies regarding what appears to be the emerging international consensus on whistleblowing.

For example, the United Nations Convention against Corruption of 9 December 2003 (Article 33) requires each state party to consider incorporating into its domestic legal system "appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with [the] Convention." The Inter-American Convention against Corruption and the African Union Convention on Preventing and Combating Corruption have made similar recommendations to their parties.

The European Community has gone further. The European Council Criminal and Civil Law Conventions (Articles 22 and 9 respectively) require that each member state provide effective and appropriate protection for those who report criminal offenses generally, and for employees who report corruption in good faith to an appropriate authority.

Examples of Domestic Legislation

(a) U.S. - Sarbanes-Oxley Act of 2002

The Sarbanes-Oxley Act of 2002 ("SOX"), passed in the wake of scandals at Enron, Worldcom, Tyco and Arthur Andersen, addresses whistleblowing by employees of publicly held companies, and also covers a wide range of subjects such as internal corporate reports, accounting requirements, financial disclosures and other areas. In summary, SOX protects from retaliation employees of publicly held entities who disclose within their company or to law enforcement authorities, acts that they reasonably believe constitute violation of federal criminal statutes against mail, bank, wire or securities fraud, or any federal statute concerning fraud against shareholders. Disclosure of violations of securities laws or regulations are also protected, but because of ambiguous language in the statute, the courts have not made clear whether this covers disclosures of any violations at all, or is limited to violations concerning fraud against shareholders. Companies accused of retaliation have the burden of proving "by clear and convincing evidence" that they would have taken the same action regarding the employee even without the alleged whistleblowing activity. Under SOX, prohibited retaliation consists of termination, demotion, suspension, threats, harassment, failure to promote or other type of discrimination.

The scope of the SOX whistleblower protections is still being determined by the courts, a task made more complicated by the sometimes confusing statutory language. SOX is, of course, only one of many whistleblower laws in effect in the United States; there are a number of

industry-specific federal whistleblower laws, and most states have their own statutes, with widely ranging scopes of protection. Indeed, it is common for lawsuits asserting SOX claims to include a state law whistleblower cause of action as well.

(b) UK - Public Interest Disclosure Act 1998 (PIDA)

The PIDA inserted specific rights into the Employment Rights Act 1996 (ERA), in order to achieve a balance between the public interest and the interests of the employers. Essentially, workers who disclose information about alleged wrongdoings have the right not to suffer a detriment in employment (an adverse employment action) and the right not to be unfairly dismissed by their employer for making such disclosures. Unlike SOX, the PIDA offers protection to both public and private sector workers.

For a disclosure to be afforded protection under the PIDA and ERA, it must be a "qualifying disclosure." A qualifying disclosure is information which, in the reasonable belief of the disclosing worker, shows one or more of the following categories of wrongdoing; (1) that a criminal offense has been, is being, or is likely to be committed; (2) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; (3) that a miscarriage of justice has occurred, is occurring or is likely to occur; (4) that the health or safety of any individual has been, is being or is likely to be endangered; (5) that the environment has been, is being or is likely to be damaged; or (6) that information tending to show any matter falling within any one of the preceding headings has been, is being or is likely to be deliberately concealed. A disclosure is only protected if it is made to a category of person set out in the PIDA, specifically including the worker's employer. Importantly, the courts have stressed that employees are only protected if his or her belief of alleged legal wrongdoing is objectively reasonable and made in good faith.

If the worker is subjected to an adverse employment action or discharged after making a protected disclosure, he or she can pursue a statutory claim against the employer in the Employment Tribunal. While the onus is on the employee to prove his or her case, the English Tribunals have so far broadly defined protected disclosures. For example, the Employment Appeal Tribunal held that a complaint by an employee to his employer of a breach of his contract of employment could be a protected disclosure in relation to "any legal obligation."[3]

(c) France - Act nr. 2007-1598 of 13 November 2007 (article 19)

France amended its Labor Code in 2007 to prohibit discrimination against an employee who reports corruption in the workplace to his or her employer or the authorities. While an employee must report in good faith, an employer cannot sanction, dismiss, or take any direct or indirect discriminatory measure against the employee, in particular with regard to remuneration, training, redeployment, appointment, qualification, classification, professional promotion, transfer or renewal of contract. Failure to comply with this prohibition renders any termination of contract or any provision or action contrary to the legislation null and void. Indeed, where an employee has been dismissed, for example, the employee would be entitled to reinstatement.

The burden of proof lies with the employer. If the employee or applicant establishes facts giving rise to a presumption that he or she has reported or testified to certain acts of corruption, the employer must subsequently be in a position to justify its decision by certain objective elements that are unrelated to the employee's statements or testimonies.

ICC Guidelines on Whistleblowing

The ICC has recognized that there is no uniform international policy regarding whistleblowing that has been adopted by every country. As a result, the ICC has set forth the following guidelines, with the hope that companies will implement or amend their whistleblowing procedures to comply with these principles. At the same time, the ICC recognizes that companies do not wish to give employees "carte blanche" (i.e. being able to make general complaints camouflaged as whistleblowing without facing consequences, should those disclosures not be objectively reasonable or made in bad faith). Their guidelines are summarized as follows:

1. Enterprises are encouraged to provide a whistleblowing system that is commensurate with their size and resources.
2. Whistleblowing systems should aim to:
   A. Ensure that the company considers any legitimate concern, whether raised by an employee, agent, supplier or customer, in full confidence;
   B. that the same category of person deals with all reports of potential legal wrongdoing, at the earliest possible opportunity.

3. Senior officers of the company should be in charge of the management and administration of the whistleblowing procedures. Alternatively, a company can designate an independent firm to investigate any reported concerns.
4. A company should ensure that any communication channels stipulated in its procedures are adequate and in the languages of all countries where the company operates.
5. A whistleblowing system, as part of a company's voluntary integrity procedures, will only be successful if it is not over-regulated from the outside.
6. The company should consider domestic legislation, when determining if reporting under a whistleblowing procedure is compulsory or voluntary and if a worker can report anonymously as well as on a disclosed basis.4
7. All whistleblowers' reports should be diligently acknowledged, recorded and screened. A whistleblower whose report is not considered bona fide should be so advised as soon as possible and that report should be disregarded. All reports should be investigated in the strictest of confidence, and the whistleblower should be informed of the outcome of the investigation. The person who is the subject of the investigation should also be informed as soon as possible, in order to allow that person to make suitable objections.
8. All employees should be able to report serious occurrences without fear of retaliation, discrimination or disciplinary action. The whistleblower's employment, remuneration and career opportunities should be protected by the company for a reasonable period of time.
9. Companies should ensure that the confidentiality of the information revealed through whistleblowing and the identity of the whistleblower is kept confidential for as long as possible, subject as required by law.

What Does this Mean?

There appears to be little doubt that there is an emerging international consensus that whistleblowing is a legitimate tool for dealing with economic fraud and should be encouraged as one way of stemming such wrongdoing. As a result, employers need to recognize that regardless of whether they conclude that whistleblower policies are a useful tool or an unwelcome device overused by difficult employees, some level of protection is going to be required. However, as a general proposition they can provide that the protection offered only be given to those who make legitimate disclosures (*i.e*., raising concerns of legal wrongdoing rather than general grievances regarding workplace issues and/or make those disclosures in good faith). The emerging consensus, as reflected from the recent report by the Commission, seems to place greater value on the disclosure than on employers' concerns about questionable claims, and the shift in burdens of proof from the employee to the employer reflects this changing reality.

Employers should carefully consider the benefit of introducing whistleblowing procedures to see whether this is a legitimate way of curtailing legal wrongdoing in the workplace. Further, where domestic legislation provides protection to employees, it is useful to have procedures that accord with the same, particularly so managers and employees alike are aware of how whistleblowing complaints should be handled. The Commission's guidelines promote internal whistleblowing procedures and reflect the judgment, rightly or wrongly, that the benefits to employers in promoting these disclosures are self-evident. Whistleblowing procedures, however, should be precisely defined and should make clear that only disclosures that are objectively reasonable and made in good faith will be protected. Other disclosures may mean that employees will be subject to disciplinary action, if appropriate.

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[1] http://www.iccwbo.org/policy/anticorruption/iccccfee/index.html

[2] KPMG Forensic, "*Profile of a Fraudster*," Survey, 2007, p.26.

[3] *Parkins v. Sodekho Ltd*., [2002] IRLR 109

[4] See Littler ASAP - "*Toward The End of the French Exception?: Overcoming the Challenges of Establishing a Global 'Whistleblower' Hotline*" December 2005. France and Germany have placed restrictions on whistleblower hotlines.