Meal Credits

Plaintiffs also argued that the cost of meals may not be treated as part of wages. The DOL took no position on this portion of the case. The Court noted that federal regulations mandated that Bland promise to reimburse workers for meal expenses incurred during travel to Bland's farm and that, under § 203(m), "meals are always regarded as primarily for the benefit and convenience of the employee." 29 C.F.R. § 531.32(c).

The Court rejected plaintiffs' argument that Bland could not receive wage credits for meal reimbursements because H-2A program regulations required Bland to pay for such expenses and, to the extent that such regulations overlapped with § 203(m), Bland had to provide the greater benefit to the workers. The Court was also unpersuaded by plaintiffs' assertion that Bland was not entitled to wage credits for meals because under H-2A regulations, employers were required to promise in their work contracts to reimburse workers for meals while traveling to the work site. *See* 20 C.F.R. § 655.122(q). The Court concluded that Bland's failure to provide such reimbursements would violate private contracts, not the regulations themselves.

Recent H-2A Program Changes

The Court noted that a new H-2A regulation (not applicable retroactively) would impose civil penalties on employers for breaches of work contracts. *See* 20 C.F.R. § 501.19, 75 Fed. Reg. 6884, discussed in Bloomberg Law Reports, Immigration Law, Vol. 3, No. 3 (Mar. 2010). The Department of Homeland Security also recently added eleven countries to the 28 previously designated countries eligible to participate in the H-2A (and H-2B) nonimmigrant visa programs. *See* Department of Homeland Security, Designated 11 New Countries as Eligible for H-2a and H-2b Nonimmigrant Visa Programs, 75 Fed. Reg. 2879 (January 19, 2010), discussed in Bloomberg Law Reports, Immigration Law, Vol. 3, No. 2 (Feb. 2010).

Whistleblowing

Hear the Whistle Blow: Is Your Company Prepared?

Contributed by Gregory Keating, Edward T. Ellis, and Earl (Chip) M. Jones III, Littler Mendelson P.C.

Three factors are driving an exponential increase in whistleblower lawsuits. First, Congress and the state legislatures have expanded whistleblower protections by passing new laws in reaction to highly publicized scandals. Second, the courts have made whistleblower cases more attractive to the plaintiff's bar by their interpretation of statutory provisions, particularly by expanding the concepts of "protected activity" and relaxing the definition of a retaliatory act. Third, a cultural change has occurred: scandal and recession have eroded respect for corporations as societal institutions, leaving cynicism and personal financial greed in its wake. Citizens recognize that the quickest way to wealth may be to blow the whistle on the boss rather than emulate her in the hope of getting ahead.

Two Categories of Whistleblower

"Whistleblower" is a term that applies to two categories of cases that have different origins but share the core feature of exposing wrongdoing in an ostensibly law abiding business. In the first category, the plaintiff claims termination from employment because of "speaking out" about violations of the law, governmental waste, fraud and abuse, public health and safety, or other practices or events affecting the public interest.[1] Included in this category are plaintiffs who claim retaliation under the Sarbanes-Oxley Act,[2] Title VII of the Civil Rights Act of 1964,[3] the Age Discrimination in Employment Act,[4] the Americans with Disabilities Act,[5] the First Amendment to the U.S. Constitution,[6] and the scores of state anti-discrimination and whistleblower statutes.[7] These plaintiffs feel that they have acted in the public interest and they are defending themselves against retaliation by their employer.

In the second category of whistleblower action an individual seeks a reward for exposing a wrongdoer to justice. Typical of this type of claim are *qui tam* actions under the federal False Claims Act, 31 U.S.C. § 3729-3733, claims pursuant to the Internal Revenue Service Whistleblower Program, and bounty claims under section 922 of the recent Dodd-Frank Act, 15 U.S.C. § 78u-6. While employees initiate most cases in this second category, employment status is not a requirement. The only requirement is that the information be useful to law enforcement. These whistleblowers act out of

good old fashioned capitalist greed. Their ultimate objective is to collect the reward. Both categories of whistleblower claims are experiencing a surge in popularity.

Legislative Expansion of Whistleblower Rights

Almost every new federal remedial statute contains an anti-retaliation provision. The Sarbanes-Oxley Act is the best publicized new statute (2002) - through 18 U.S.C. § 1514A, SOX protects employees who raise claims of securities fraud by publicly traded companies - but it is hardly the only new statute. Congress has strengthened the whistleblower protection and bounty provisions of the Federal False Claims Act (2009 and 2010),[8] added whistleblower protection to the consumer product safety laws through the Consumer Product Safety Improvement Act (2008),[9] added whistleblower protection to pipeline safety through the Pipeline Safety Improvement Act (2002),[10] added whistleblower protection to the food and drug laws through the FDA Food Safety Modernization Act (2011),[11] added whistleblower protection to the Seaman's Protection Act (2010),[12] and implemented general whistleblower protection in both the Patient Protection And Affordable Case Act (2010) (popularly known as "Obamacare")[13] and the American Recovery and Reinvestment Act (2009) ("the stimulus package").[14] The Dodd-Frank (2010) Act,[15] of course, contains both bounty and whistleblower protection provisions, and covers publicly traded corporations and business in the financial industry.

The DOL's Occupational Safety & Health Administration (OSHA) now enforces 21 different whistleblower statutes as part of its "Whistleblower Protection Program." Seven are environmental statutes; [16] six are transportation statutes; [17] two are the new financial industry statutes;[18] the rest fit no particular classification.

The states, meanwhile, have not been idle. According to the National Conference of State Legislatures, 37 states have enacted some type of whistleblower protection statute.[19] Many of the statutes are limited in subject matter – the environment, public safety and health, and government funding being the most common. Coverage of public employees is more common than coverage of private sector employees. Not all statutes provide a private right of action and many protect only reports to regulatory or law enforcement agencies. However, some states have enacted statutes that protect any employee who has objected to what the employee reasonably believes to be a violation of law or public policy, and allow employees to sue in court to secure that protection.[20]

Judicial Expansiveness in the Whistleblower Area

The courts have encouraged whistleblower protection in two principal areas: first, by expanding the scope of retaliatory acts, especially after *Burlington Northern and Santa Fe Railway Company v. White,* 548 U.S. 53 (2006). Prior to *Burlington Northern*, the lower courts had generally held that to be actionable, retaliation had to be an "adverse employment action," and lawyers argued over whether items like a job transfer, a "verbal warning," a change in reporting relationship, or an action not employment-based were retaliation. *Burlington Northern* ended that debate with the pronouncement:

> We conclude that the anti-retaliation provision [Section 704] does not confine the actions and harms it forbid to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

After *Burlington Northern*, the only standard is whether the retaliatory act is "material," i.e., whether it could dissuade a reasonable worker from undertaking a whistleblower act.

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The Supreme Court has also expanded the concept of "protected activity," most recently when it held that statutory protection went beyond the individual who engaged in protected activity directly to include a fiancé who had not. *Thompson v. North America Stainless, LP,* 562 U.S. __, 131 S. Ct. 863 (January 24, 2011). This holding is, of course, a logical extension of the *Burlington Northern* holding that anything is actionable that "could well dissuade a reasonable worker" from engaging in protected activity. Thompson came just two years after *Crawford v. Metropolitan Government of Nashville,* 555 U.S. 271 , 129 S. Ct. 846 (2009) in which the court held that an employee's participation in an interview that was part of an internal EEO investigation was protected activity, even though the employee had not complained and had not volunteered for the interview.

The state courts, lower federal courts and administrative tribunals have contributed to the expansion of employee protections. Historically, the concept of "protected activity" did not include theft of confidential company documents. The New Jersey Supreme Court recently disturbed that view in *Quinlan v. Curtis Wright Corporation,* 204 N.J. 239 (2010), holding that, in the case of a litigant who had taken 1,800 pages of confidential personnel documents including the as-yet-unreleased performance appraisal of her rival for a promotion, it was protected activity for the plaintiff's lawyer to use the documents in a deposition in the case.

The Obama Administration's Administrative Review Board (ARB) at the Department of Labor likewise recently expanded

whistleblower protection within its portfolio of 21 statutes. In *Menendez v. Halliburton, Inc.*, ARB Case Nos. 09-002, 09-003 (September 13, 2011), the ARB announced that it was going beyond *Burlington Northern* in interpreting Sarbanes-Oxley (although it found the Supreme Court's decision a "useful starting place"), a statute that contains language expressly limiting adverse action to the "terms and conditions of employment." The ARB held that failure to maintain the confidentiality of a SOX whistleblower was a violation of SOX § 806 regardless of the financial, or career consequences to the employee.

There can be little doubt that the courts have accommodated whistleblowers in the past 5-10 years by expanding the scope of protected activity and lowering the threshold for a retaliatory act.

In *Vannoy v. Celanese Corp.* ARB Case No. 09-118 (September 28, 2011), the ARB held that theft of confidential employee financial information for the purpose of supporting an IRS whistleblower claim was cognizable under SOX. The ARB did not cite *Quinlan,* but the parallels are obvious.

There can be little doubt that the courts have accommodated whistleblowers in the past 5-10 years by expanding the scope of protected activity and lowering the threshold for a retaliatory act.

A Cultural Shift

It would have been unlikely two decades ago that a law firm would advertise itself as "SECsnitch.com," and yet that designation today is one of the more mild marketing techniques. Others "whistleblower law firms" exhort employees to "fight fraud and greed," and "click to chat with our live specialists." Perhaps the best indicator of a change in the culture is the ongoing "Whistleblower Tour," sponsored by the Government Accountability Project, a Washington, D.C.-based whistleblower advocacy group. The Tour brings together prominent whistleblowers (e.g., Sherron Watkins of Enron fame) with academics in a university setting to discuss business ethics and the value of whistleblowing to society at large.

These are indicia of a change in the image of big business in large parts of society. Scandals like Enron, World Com, Bernie Madoff and the economic collapse of 2008-09 have engendered an attitude that corporations are to be attacked when the attack may prove profitable. Congress has encouraged those attacks through bounty legislation.

The Unknown Risks Employers May be Facing

Employers may not yet appreciate the type or scope of risks they face in this new era of the whistleblower, relying instead on familiar but outdated systems of compliance and workforce management. With nearly ten years since the passage of the Sarbanes-Oxley Act, which introduced whistleblower protections and new requirements for anonymous reporting mechanisms, employers may have become complacent about their internal compliance practices and procedures, reassuring themselves that "no news is good news" when it comes to the quiet hotline or other internal reporting system. In fact, a quiet hotline may be due to flaws in the promotion or maintenance of that system, rather than the company's compliance record or employee perceptions regarding compliance. In other words, a quiet hotline or other reporting mechanism may signal not so much a clean bill of compliance health as a lack of employee awareness or trust in existing compliance mechanisms.

Relatedly, employers may not yet fully appreciate the scope of the new and expanding market for whistleblower tips. With the advent of the Dodd-Frank bounty, an employee who suspects misconduct of some kind thereby acquires a valuable commodity and must consider competing values and incentives when deciding who will be the tip's recipient. The SEC or U.S. government may reward the right kind of tip with millions of dollars, just as attorneys and self-styled activist organizations will vie for the whistleblower's inside scoop. What is more, the market value of the whistleblower's tip is tied to the egregiousness of the underlying violation. Therefore, a cynical whistleblower may allow misconduct to go unreported so that the violation snowballs into something he thinks worthy of a more significant sanction and, as a result, a higher award.

Even the most well-intentioned whistleblower may choose not to report internally if he harbors some suspicion about the Company's commitment to ethics or its ability to protect him from retaliation. In a recent survey of employee trust in corporate management,[21] only 14% of the employees surveyed believed their company's leaders to be ethical and honest and only 7% agreed that the actions of company management were consistent with their words. In this climate, even employees motivated to act out of genuine conviction may not trust their employer to respond to an internal complaint in a thorough, effective and non-retaliatory manner. Even if the employee's perception is inaccurate or his or her concerns about retaliation misplaced, those misperceptions may nonetheless determine how the employee chooses to handle concerns regarding compliance issues, increasing the odds that the employee eschews internal compliance mechanisms for a government agency or other external alternative.

Yet another risk employers may not yet fully appreciate is the extent to which contemporary public perceptions of "the whistleblower" can affect litigation or the public relations impact of a whistleblower claim. As described above, the whistleblower is a figure of cultural significance, portrayed in Hollywood and the media as a courageous and ethical paragon who takes personal and professional risks in order to speak truth to corporate and government power. Although many claimants who pursue a whistleblower claim to trial do not match the public perception

of the prototypical whistleblower's characters or motivations, that truth may be lost on a jury steeped in the current image of the whistleblower.

Finally, employers may, despite confidence in their anti-retaliation policies, be facing a significant and unrecognized risk that a whistleblower's managers and even co-workers will engage in retaliatory conduct toward the whistleblower if they learn of the whistleblower's tip or are questioned during the company's internal investigation. It is important to remember that retaliation can take many forms. In *Mendendez v. Halliburton*, the U.S. Department of Labor's ARB cited a standard defining adverse action as an "unfavorable employment action that [is] more than trivial." Under this liberal standard, many actions short of demotion or termination may be considered sufficient to form the basis of a retaliation claim. For example, a change in work duties or retaliation/isolation by co-workers could give rise to an actionable retaliation claim. *Menendez* itself provides a telling example since there the ARB found mere disclosure of a whistleblower's identity to be an actionable adverse employment action.

Creating this culture of compliance will pay dividends not just in terms of decreased legal risk, but also in terms of increased employee trust and allegiance to the strategic direction of the business.

What Employers Can Do to Prevent Whistleblower Claims

As with any new significant legal development, the first task an employer should undertake is to reassess the risk created by the new legal framework. Dodd-Frank heightens the risk that misconduct will occur, leading to material harm (legal, financial, or reputation) to the business, that could have been avoided had the misconduct been reported. Many businesses outside of the financial services industry may believe that Dodd-Frank does not create any new regulatory risks. While technically true, Dodd-Frank acts as a spotlight and highlights existing risk areas and cracks in the business. A person who knows where the weaknesses exist will have ample incentive to start investigating questionable business practices as a way to win the lottery, (aka "the bounty)." Consequently, employers should step back and take a fresh look at their risk inventories and determine whether new mitigation initiatives should be deployed. The next step employers should take is to re-examine their cultures and the "tone at the top." While most business leaders acknowledge that employee engagement with and commitment to the business' values and strategic priorities are significant assets, those qualities are often managed and measured infrequently and inconsistently. The best method to determine what employees actually believe about the leaders of the business is to ask. Culture and employee engagement surveys, when used as part of an integrated performance measurement program with clear objectives, will enable employers to measure the "tone" of the business and the leadership.

Companies should also review and revamp codes of conduct, internal compliance policies and procedures, reporting policies and programs, investigation procedures, and whistleblower and anti-retaliation policies. There is no one-size-fits-all code of conduct or roadmap to creating a culture of compliance. Instead, a company should work to identify the values and priorities of its organization and then develop policies and a code of conduct reflective of those values and priorities, recognizing that companies are living and dynamic organizations with no two cultures or set of business needs precisely the same. Once a company has assessed the compliance risks that require attention and developed a code of conduct and other policies that reflect its business strategy, risk profile and culture, company leaders must do what they can to create this culture throughout the organization. From employee updates and reminders, to sharing the results from culture surveys, to consistent messages and conduct from leadership, it is important to establish a consistent "tone at the top" reflective of the organization's commitment to ethical business practices as a strategic priority.

Creating this culture of compliance will pay dividends not just in terms of decreased legal risk, but also in terms of increased employee trust and allegiance to the strategic direction of the business. When employees are aware of and trust their organization's values and commitment to ethics, they are much more likely to also trust internal reporting systems and the company's ability to respond to complaints. The best way to foster and ensure trust in the internal reporting system is for the company to establish a track record of responding promptly, thoroughly and consistently to internal reports and to effectively protect employees who make internal complaints from any form of retaliation.

In the new age of the whistleblower bounty, employers may fear that a functioning internal complaint system is simply not enough. Encouraging internal reporting and conducting effective investigations is now more important than ever, and it is true that employers can and should search for innovative new ways to do so. Employers should test their complaint intake process to make sure that those who are receiving complaints are accurately recording the salient facts from the report. Having an anonymous reporting system that also allows for continued communications during the investigation will offer even the most reluctant reporter a method to raise a concern or ask a question. Incident data should be analyzed to determine whether variations of the quality, quantity, and type of complaints between locations or business units are early warning signals of potential misconduct. Employers should also adopt a process to follow-up with whistleblowers to ensure that no signs of retaliation have appeared and that adverse employment actions are thoroughly reviewed before making a decision affecting a whistleblower.

Employers should also integrate ethics and compliance objectives addressing high risk areas more fully into their hiring and performance evaluation processes. Including a compliance/

ethics metric or objective in performance evaluations offers an opportunity to acknowledge that identifying and raising compliance-related concerns is an important part of doing the job well.

Finally, employers may want to review social media and communication policies to impose permissible limitations on disclosure of confidential information to the general public or the media. Employers must encourage employees to report wrongdoing promptly in order to conduct a thorough investigation. When allegations are publicly disclosed prior to investigation, the employer's ability to remedy and address misconduct may be irreparably harmed, and the employer's policies should reflect that concern.

Responding to Whistleblower Claims: Laying the Groundwork

The time a company has to respond to a whistleblower's report or complaint is all too brief. For example, a whistleblower can use the date of an internal report for purposes of assessing whether he or she was the first to provide certain information to the SEC and therefore qualifies for a monetary award, so long as the whistleblower reports to the SEC within 120 days of making that internal complaint. Accordingly, a company has 120 days from the date of an internal complaint to investigate and respond to the substance of the complaint, determine whether self-reporting is required and/or advisable and develop the best human resources strategy for continuing to manage the whistleblowing employee in a productive, fair and legal manner.

When an internal complaint, government investigation or whistleblower lawsuit arises, the response must be well-coordinated at a high level to ensure that it is properly managed from both a compliance and human resources perspective. For this reason, employers can benefit now from efforts to plan a response down the road, asking themselves critical questions, such as: Who will conduct the investigation? How can we ensure that any investigation and response has the coordinated involvement of corporate compliance and human resources? Will outside counsel be involved? How can the company best ensure the whistleblower's confidentiality while also conducting a thorough investigation and protecting that employee from any form of retaliation? This is also a good time to conduct training for those tasked with internal investigations and to provide training on retaliation and whistleblowing to supervisors and managers. Planning and training now will help ensure that a company is well-positioned to have prompt and well-coordinated response when the clock is running and the stakes are high.

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[1] Typical of this first category of whistleblower is the deputy district attorney in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), who alleged that the DA retaliated against him in his employment because he pointed out (indeed, in courtroom testimony) that the search warrant in a criminal matter had been procured with a false affidavit.

[2] Pub. L. 107-204, amended by Pub. L. 111-203; 18 U.S.C. § 1514A *et seq.*

[3] 42 U.S.C. § 2000e-3(a).

[4] 29 U.S.C. § 623(d).

[5] 42 U.S.C. § 12203(a).

[6] U.S. Const. amend. 1.

[7] *E.g.*, New Jersey's Conscientious Employee Protection Act, N.J.S.A. 34:19-1 *et seq.*

[8] 31 U.S.C. § 3729 *et seq.*;

[9] 15 U.S.C. § 2051; Pub L. 110-314 (Aug. 14, 2008).

[10] 49 U.S.C. § 60101; Pub. L. 107-355 (Dec. 17, 2002).

[11] 21 U.S.C. § 2201; Pub. L. 111-353 (Jan. 4, 2011).

[12] 46 U.S.C. § 2114; Pub. L. 111-281 (Oct. 15, 2010).

[13] 42 U.S.C. § 18001 *et seq.*; Pub. L. 111-148 (Mar. 23, 2010).

[14] 26 U.S.C. § 1 *et seq.*; Pub. L. 111-5 (Feb. 17, 2009).

[15] 12 U.S.C. § 5301 *et seq.*; Pub. L. 111-203 (July 21, 2010).

[16] The Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2641 *et seq.*, Pub. L. 99-519 (Oct. 22, 1986); Safe Water Drinking Act, 42 U.S.C. § 300f; Pub. L. 93-523 (Dec. 14, 1974); Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*, Pub. L. 94-469 (Oct. 11, 1976); Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*, Pub. L. 89-272 title II (Oct. 20, 1965); Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, Pub. L. 92-500 (Oct. 18, 1972); and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*, Pub. L. 96-510 (Dec. 11, 1980).

[17] Surface Transportation Assistance Act, 23 U.S.C. § 101, Pub. L. 95-599 (Nov. 6, 1978); International Safe Container Act, Pub. L. 95-208 (Dec. 13, 1977); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 40101, Pub. L. 106-181 (Apr. 5, 2000); Pipeline Safety Improvement Act, 49 U.S.C. § 60101; Pub. L. 107-355 (Dec. 17, 2002); Federal Railroad Safety Act, Pub. L. 91-458 (Oct. 16, 1970); National Transit Systems Security Act, 6 U.S.C. § 1101, Pub. L. 110-53 (Aug. 3, 2007).

[18] Sarbanes-Oxley and the Consumer Financial Protection Act (section 1057 of Dodd-Frank), 12 U.S.C. § 5567, Pub. L. 111-203, title X Sec. 1057 (July 21, 2010).

[19] http://www.ncsl.org/?tabid=13390 (updated to November 2009).

[20] *E.g.*, New Jersey Conscientious Employee Protection Act, N.J.S.A. § 34:19-1, *et seq.*; Florida's Private Whistle-Blower's Act, F.S. § 448-101 to 448-105.

[21] *See Americans Still Lack Trust in Company Management Post-Recession* (July 8, 2011), *available at* http://www.maritz.com/en/Press-Releases/2011/Americans-Still-Lack-Trust-In-Company-Management-Post-Recession.aspx.