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The Expanding World of the Whistle Blower

Service

Labor & Employment

The Consumer Product Safety Improvement Act of 2008 ("CPSIA"), signed into law by President Bush in August 2008, is merely the most recent of more that 100 federal statutes and regulations that contain whistleblower provisions protecting employees who "blow the whistle" on their employer. The most prominent of these in terms of publicity is the Corporate and Criminal Fraud Accountability Act of 2002, more commonly known as the Sarbanes-Oxley Act, or "SOX." The more recent CPSIA's prohibitions (which are typical of other whistleblower statutes) cover discharge or discrimination when an employee:

provided, caused to be provided or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this Act or any other Act enforced by the [Consumer Product Safety] Commission, or any order, rule, regulation, standard or ban under any such Acts;

testified or is about to testify in a proceeding concerning such violation;

assisted or participated or is about to assist or participate in such a proceeding; or

objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this Act or other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Act.

Many states have similar statutes or common law protection. For example, Michigan and Illinois have specific whistleblower statutes. Missouri and Texas have judicially created exceptions to the employment at will doctrine that provide remedies to employees who report violations of law or public policy to superiors or public authorities.

If a violation is proven, the employee is entitled to reinstatement with back pay and restoration of all the rights of that employment, compensatory damages, including all costs and expenses incurred in protecting his or her rights, including attorney and expert witness fees. If, on the other hand, the claim is found to be frivolous or in bad faith, the employer may be awarded its reasonable attorneys fees up to $1,000, or roughly the cost of the initial consultations with its counsel.

Claims brought under these whistleblower statutes are very much like retaliation claims brought under the federal and state discrimination laws. To prevail, the employee must prove (1) involvement in some activity protected by the statute or regulation such as reporting illegal activities, participating the proceedings concerning violations of the statutes or regulations, or opposing; (2) that the employer had knowledge of the protected activity by the employee; (3) adverse employment action by the employer; and (4) a causal connection between the protected activity and the adverse employment action.

Most of these statutes and regulations require that the employee had a reasonable belief that the activity at issue was illegal or in violation of the statute or regulation. Whether the belief is reasonable is both a subjective and objective determination: the employee has to demonstrate that he/she genuinely believed that the activity reported violated the statute under which the employee claims protection, and a reasonable person in his/her situation would have believed the activity violated the statute.

Avoiding Whistleblower Claims

Once the employer becomes aware of the whistle blowing activity and the identity of the whistleblower, it is imperative that reasonable steps be taken to prevent any retaliatory acts.

First, protect the identity of the whistleblower to the extent possible. Lack of knowledge of the protected activity is the best and easiest defense to a whistleblower retaliation claim.

Second, advise the whistleblower of the employer's policy against retaliation. If no such policy exists, counsel the whistleblower to come forward with any complaints or concerns about retaliatory conduct. It is often helpful to identify a particular individual within the HR organization or other appropriate individual as the contact person for such complaints. That person should periodically affirmatively inquire about any retaliatory conduct, and document all responses, including negative responses.

Third, counsel managers and others with knowledge of the identity of the whistleblower that there is to be no retaliation against the employee, not to disclose the identity of the employee to others, and to monitor the work environment to be sure that there is no retaliatory behavior.

Fourth, as with any other employee, whistle blowing activity does not relieve the employee of the responsibility to perform his or her job duties to the reasonable expectation of the employer. The whistle blower should be treated no better or worse than other employees, and all actions, positive or negative, affecting the employee should be documented. Because of the potential for a retaliation claim, HR staff and counsel should be contacted before any adverse action is taken.

Finally, a situation may arise that makes it difficult to retain the employee in his or her assignment. In such cases, any transfer or realignment of duties should be to a position that is at least comparable in terms of compensation and terms and conditions of employment as the current assignment. Alternatively, a paid leave of absence may be in order. In all such changes, the employer should attempt to obtain the employee's consent to the action, and failing that, document carefully the reasons for the change, its expected duration, and the anticipation that the employee will be entitled to reinstatement once the issues requiring the leave are resolved. Advice of counsel is recommended in these situations.

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