Whistleblower and Whistleblowing - 101

Whistleblowers, between October 1986 and September 2020, caused the return of just over $64 billion[1] to the United States (U.S.) government under the False Claims Act (FCA), according to the Civil Division of the Department of Justice. Whistleblowers successfully helped uncover fraud and wrongdoing on the part of government contractors.

A bit of history - The FCA was passed on March 2, 1863, during the American Civil War, to assist the government in prosecuting cases for fraud against the government. The FCA allows for qui tam lawsuits, which are those brought by private whistleblowers (also known as "relators"), who have information related to fraud on government contracts, which, if successful, entitle the relator to a portion of the recovery collected by the government. During that same period (October 1986-September 2020), relators received a total of just over $7.8 billion[2] as their part of the recovered funds.

The ACFE has highlighted several heroic international whistleblowers over the years at various conferences, including Briton Michael C. Woodford, a 30-year veteran of Olympus Corporation and recipient of the ACFE 2012 Cliff Robertson Sentinel Award[3], who questioned sizable fees Olympus paid to hide losses from securities investments.

Other notable whistleblowers were investigative reporter Clare Rewcastle Brown, recipient of the 2018 ACFE Guardian Award[4], who uncovered the international Malaysia Development Berhad (1MDB) scandal, as well as Pav Gill, who exposed Wirecard — one of Europe's greatest financial scandals.

Each of these remarkable individuals stepped forward to identify wrongdoing and expose violations of the law. Whistleblower contributions are so invaluable in the fight against fraud and corruption, the ACFE includes "*Working with Whistleblowers*" into one of its online self-study programs.

Whistleblower and Whistleblowing - Are they the same? The short answer is NO.

In a general sense, anyone can "blow the whistle" (whistleblowing) on what they believe to be improper conduct, whether it be a private citizen, a government employee, or a contractor employee. For the purpose of this article and at the simplest level, a whistleblower is someone who reports waste, fraud, abuse, corruption, or dangers to public health and safety, to someone in a position designated to rectify the wrongdoing. A whistleblower typically works inside an organization where such wrongdoing is taking place; however, being an agency or company "insider" is not essential to serving as a whistleblower. What matters is the disclosure of specific information of wrongdoing that otherwise may have gone unreported or unknown to a person(s)

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[1] https://www.justice.gov/opa/press-release/file/1354316/page 3

[2] https://www.justice.gov/opa/press-release/file/1354316/page 3

[3] This award is bestowed annually on a person who, without regard to personal or professional consequences, has publicly disclosed wrongdoing in business or government.

[4] The Guardian Award is presented annually to a journalist whose determination, perseverance and commitment to the truth has contributed significantly to the fight against fraud.

authorized to receive the information. To protect whistleblowers from retaliation of their employers, several whistleblower legislations' have provisions of protections.

Are whistleblowers always protected from retaliation under the law? - It all depends.

Whistleblower (WB) retaliation can occur in many forms including harassment, demotions, pay cuts, negative evaluations, losing out on a promotion, and even losing their job. In the U.S., where the Federal Government has multiple WB laws (to include most recently, the Veterans Administration (VA) Accountability First Act of 2017), it can be somewhat confusing on what protection is guaranteed. To determine what appropriate legal protections exist, it begins with the definition under the individual Law/Act to which the whistleblowers are reporting. Therefore, when someone steps forward, they must understand which law their reporting falls under in order to ensure the correct protection from adverse action is afforded them.

When it comes to whistleblower retaliation protection in the U.S., the most well-known legislation is the Whistleblower Protection Act of 1989 and the Whistleblower Protection Enhancement Act of 2012. Others include the Sarbanes-Oxley Act and the Dodd-Frank Act. Even with these various law/acts, the good news is that a common thread exists within most when it comes to protection from retaliation. Specifically, when an employee correctly follows the reporting procedures outlined in the laws, he or she is protected from retaliation for acting as a whistleblower, even if his or her allegation is found to be incorrect.

Along with the federal government, most American states also have their own WB laws designed to protect those reporting concerns from retaliation of their employers. For example, the Florida Whistleblower Act makes clear the intent of WB protection is to prevent agencies or independent contractors from taking retaliatory action against an employee who reports to appropriate authority violations of law on the part of a public employer or independent contractor. The Florida Whistleblower Act is soliciting potential violations that creates substantial and specific danger to the public's health, safety, or welfare, along with allegations of improper use of one's governmental office, gross waste of funds, or any other abuse or gross neglect of duty on part of an agency, public officer, or employee[5].

Again, depending on the jurisdiction, any U.S. government employer that wrongfully retaliates against a whistleblower, with harassment, demotions, pay cuts, negative evaluations, losing out on a promotion, and even losing their job, the WB may be entitled to sue for damages, which can be quite substantial under both federal and state laws. Employees who undergo retaliation may also have whistleblower rights under various avenues such as the Occupational Safety and Health Administration (OSHA) regulations and other similar administrative mechanisms.

Do WB laws globally contain protection from retaliation of employers? – It depends.

Recognizing the role of whistleblowing in fraud-fighting efforts, many countries have pledged to enact or have enacted WB protection laws. Internationally, you will find examples of legislation that protects WBs from employer retaliation consistent with the U.S. However, in other

[5] Cite 112.3187, Florida Statutes

countries WB legislation is not to protect from employer retaliation when reporting government waste or abuse, but with protection of government witnesses from physical harm or death when testifying in criminal trials. For example, the Federal Democratic Republic of Ethiopia, Proclamation Number 699/2010 "*Protection of Witness and Whistleblowers of Criminal Offences*" provides protection for witnesses and whistleblowers of criminal offences from direct or indirect danger and attack they may face as a consequence of being a witness in an investigation or trial[6]. The types of protection may be:

- Physical protection of person and property;
- Providing a secure residence including relocation;
- Concealing identity and ownership:
- Change of identity;
- Provision of self-defense weapon; thereof and thereby to ensure their safety;
- And much more.

No place in this law is protection provided for WB reporting related to waste of government resources, or misuse of one's position that does not elevate to a criminal action under other laws, or misconduct of government employees restricted under administrative rules. Ethiopia does not have a WB protection for non-criminal violations, but is currently working a revision to this law and hopefully will consider extending protection beyond only criminal reporting[7].

These protections of government witnesses in a criminal proceeding are vital. However, not all reporting of potential misconduct reaches the level of criminal behavior, nor does every witness in a criminal trial risk being threatened with physical harm or death. When only criminal witness protection is afforded, leaving out protection from employer retaliation, can have a chilling effect on employees not reporting gross waste or mismanagement of government funds or administrative misconduct.

Can Non-Disclosure Agreements restrict WB reporting? - Not on U.S. Federal Contracts.

A non-disclosure agreement or NDA are common across numerous industries and designed to protect a company's sensitive financial, business strategies and other competitive and production information. However, such agreements can also be used to attempt to silence whistleblowers in order to keep illegal activity under wraps. Some NDA's are so strictive they may even prohibit the employee from informing the government of the existence of NDA's and the restrictions placed upon them.

Within the U.S., under federal statutes and regulations, there are prohibitions on these restrictive non-disclosure agreements in federal government contracts and in government-funded business. For example in 2017, the Federal Acquisition Regulation (FAR), the primary regulation used by American agencies when acquiring supplies and services through appropriated funds, was

[6] https://www.lawethiopia.com/index.php?option=com_content&view=article&id=2186:proclamation-no-699&catid=155&Itemid=1026

[7] https://www.unodc.org/easternafrica/en/Stories/unodc-supports-government-of-ethiopia-to-review-proclamation-on-witness-protection-and-whistleblowers.html

amended to prohibit "*the use of funds, appropriated or otherwise made available, for a contract with an entity that requires employees or subcontractors to sign an internal confidentiality agreement that restricts such employees or subcontractors from lawfully reporting waste, fraud, or abuse*[8]" to the appropriate regulatory authority.

There are also multiple public laws that include clauses that prohibit restrictions on U.S. federal employees to communicate to Congress or file whistleblower claims. In the Consolidated Appropriations Act of 2016 (Public Law No. 114-113 § 713 (2015)), Congress prohibited funds appropriated by the Act for "*a contract, grant, or cooperative agreement with an entity that requires employees or contractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or contractors from lawfully reporting such waste, fraud, or abuse*."

Under the Whistleblower Protection Enhancement Act, any nondisclosure policy, form, or agreement from the government shall include a statement noting that it shall "*not supersede, conflict, or alter the employee obligations, rights, or liabilities created by existing statute or Executive order*" relating to classified information, communications to Congress, reporting to an Inspector General (IG), or any other whistleblower protection.

Are "Good Will" provisions in the law a logical requirement? – Depends on who you ask.

Some WB legislation has what is referred to as a "good will" or a "good faith" provision, which basically requires that the person reporting the potential wrongdoing is making the report with honest intensions (i.e., believing the reporting to be true). For example, in the state of Oregon any worker may report actions they believe violate local, state, or federal laws. These reports are protected, which means that it is illegal for employers to discharge, demote, suspend or in any manner discriminate or retaliate against a worker for making a good faith report of information the worker believes violates the law. A report does not have to be substantiated for the whistleblower to be protected from retaliation. The worker must simply have a good faith belief when reporting a violation of law or unsafe working conditions[9].

There is much consternation in this "good will" requirement and is often the subject of lengthy debate whether this type of provision should be taken into consideration when determining WB reporting. Few would challenge the importance of WB's, only reporting when they believe the information is true. However, the concern is raised when the reported misconduct is not substantiated, does an investigation now focus on the WB to determine if they made a false report? Does the initiation of the investigation of the WB start up automatically? What burden of proof is required "beyond a reasonable doubt" as in a criminal case or "preponderance of evidence" in a civil case? What about in an administrative hearing by the employer?

Another question raised is whether to first validate why the WB believes the reporting is true, before initiating the investigation of the allegations. Granted, asking any witness, even beyond those being WB reporting, why they believe what they are reporting is true, is routine. However,

[8] FAR clause 52.203-19 Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements.
[9] https://www.oregon.gov/boli/civil-rights/Pages/whistleblowing-protections.aspx

being the "good will/faith" provision exist in WB legislation, does it require investigative resources be first dedicated to validating the WB's belief?

Are "good will/faith" provisions a logical requirement? This will be something individual jurisdictions will need to determine. However, whatever is decided, the key is to not create a perception of fear from good intended WB from coming forward.

Is WB legislation under attack in the U.S.? – Yes!

On 29 November 2021, *The Intercept* published an article titled "*Pfizer Is Lobbying to Thwart Whistleblowers from Exposing Corporate Fraud."* The article reported Phizer was among the big pharmaceutical companies trying to block new U.S. federal legislation designed to make it more difficult for companies charged under the FCA to have their case dismissed on procedural grounds the fraud was not "*material*." The FCA defines the materiality requirement as "*having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property*[10]."

In 2016, the U.S. Supreme Court ruled in Universal Health Services v. United States ex rel. Escobar that a fraud lawsuit could be dismissed if the government continued to pay the contractor. The court reasoned that if the government continues to pay a company despite the knowledge of fraudulent activity, then the fraud is not "*material*" to the contract.

On July 22, 2021, Senator Chuck Grassley, R-Iowa, proposed new legislation called the False Claims Amendments Act of 2021[11] to counter the courts position on materiality. The legislation adjusted the materiality standard to include instances in which the government made payments despite knowledge of fraud "*if other reasons exist*" for continuing the contract. Another key item of the proposed legislation was a clarification that the FCA applied to post-employment retaliation, including blacklisting a whistleblower or bringing a retaliatory suit against the whistleblower in an attempt to force them to drop the *qui tam* suit.

The proposed bill has other detractors. For example, a letter dated October 27, 2021, to Senator Dick Durbin and Senator Chuck Grassley, signed by twenty-five different organizations, detailed an opposition to the proposed bill[12]. The signatures of the letter identified that the proposed legislation would exacerbate already existing problems during FCA litigation in three ways.

First, it could undermine the U.S. Supreme Court's unanimous 2016 decision in *Universal Health Services v. U.S. ex rel Escobar* on materiality. Second, the proposed bill, would narrow the ability of the Department of Justice (DOJ) to dismiss problematic *qui tam* suits that it finds to be meritless. Finally, there is no time-based or other limit on the bill's backward-looking anti-retaliation provision for former employees.

[10] 31 U.S.C. § 3729(b)(4)

[11] https://www.govtrack.us/congress/bills/117/s2428

[12] https://www.aha.org/system/files/media/file/2021/10/aha-others-express-opposition-to-false-claims-amendments-act-s2428-letter-20-27-21.pdf

As reported by The Intercept, Senator Tom Cotton, R-Ark, also raised objections to key elements in the proposed bill during a Judiciary Committee hearing. During committee debate, Senator Cotton allegedly argued that the Supreme Court "made the right decision" in the Escobar case for the "continued payment" standard for materiality. Additionally, he was concerned the legislation "potentially could increase health care costs," echoing industry claims that litigation from the FCA would force health care interests to raise prices.

To solicit the views of ACFE members, a question was posted in the "general forum" of the ACFE community page. The question simply asked if the Supreme Court's view on dismissing FCA cases is appropriate or if Senator's Grassley's view that the continued payment is not the key factor in a dismissal? Admittedly, only a few responded, but the general tone was that if there was a situation where no other source for the goods or services and the government had implemented strenuous controls to protect against future frauds, then continued payment would be logical. Simply stated, if the need of government outweighs the risk of fraud continued payment is a reasonable step. This seems to support Senator Grassley's view on the proposed change to the "materiality" definition of the 2016 court case.

The proposed bill was considered by the Senate Judiciary Committee on October 2021, and resulted in a decision through vote, to issue a report to the full chamber recommending the bill be considered for passage. If passed by the Senate, it would still need to be passed in the U.S. House of Representatives and eventually signed by the President.

Key Points of an Effective WB Legislation

This article focused on government WB laws up to this point, but private companies should also consider implementing effective WB policies. Regardless of government or private sector, both must ensure a robust WB legislation/policy is in place, including acknowledgment of ***who is*** or ***is not*** considered protected. At a minimum three key factors must be considered:

1. Nature of Information Disclosed
2. Who is Protected?
3. Whom Information is Disclosed

Nature of Information to be Disclosed. U.S. WB government legislation requires the information being reported raises to a public health and safety concern or "***gross***" fraud, waste, misconduct, and/or abuse? Keep in mind, WB complaints are intended to be the most egregious violations that should have a priority concern. Private companies can also use this approach and level of reporting.

Who is Protected? Most legislation or policies define this as – an employee, former employee, applicant, and/or contractor employee. Ultimately, who can be protect is related to the legal authority over the person being protected? Ask yourself, should or can the government protect a private citizen from job loss or retaliation when they do not work for them?

Whom Information is Disclosed. In order to ensure consistent application and maintaining confidentiality if required, the law/policy needs to define who (entities) a WB must report to in order to determine eligibility.

Should other items be included in any WB legislation or policy, absolutely, but at a minimum these three are the basic starting points.

In Summary

As we progress forward with revisions and/or amendments to current Laws/Acts both nationwide and globally, perhaps a reminder as to the purpose of an effective WB law and its implementing program, is appropriate.

- The government (and private sector companies) openly encourage and promote a culture of uninhibited reporting of wrongdoing to appropriate authority in order to minimize waste, fraud, abuse, corruption, or dangers to public health and safety?
- To instill confidence within employees or individuals that decide to "blow the whistle" it's important to step forward and in doing so they will be protected from retaliation.
- To optimize program viability, there must be trust that reporting incidents of wrongdoing are treated with the highest level of confidentiality (where appropriate).
- It's critical the identity of WB's be brought to the immediate attention of responsible authorities to ensure appropriate protections, consistent with applicable governing policies, rules, regulations, or legislation.

For more information on designing your organizational whistleblower program, please contact the authors at www.procurement-integrity.net.

About the Authors

SHERYL GOODMAN and **TOM CAULFIELD** have more than 76 combined years of experience in public and private sector oversight, ethics, procurement fraud prevention and detection, whistleblower operations, complaint intake & investigations, anticorruption, and training. They are co-founders of Procurement Integrity Consulting Services, LLC—a woman owned small business.