Corporations, Securities & Antitrust

Developments in Whistleblower Laws: Advantage Whistleblower?

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Whistleblower lawsuits represent one of the fastest-growing segments of the court dockets,[1] and the rapidly changing force of whistleblower laws increasingly poses complex legal and business challenges for employers. Legislative reforms, such as those ushered in by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "the Act")[2] have led commentators to opine that "[t]hese days, there's a cottage industry to support—and profit from—whistleblowing."[3] Indeed, in the wake of the recent reforms, lawyers have done everything from advertise in movie theaters[4] to create handbooks to guide whistleblowers through the process.[5] At the same time, regulatory agencies are increasing enforcement efforts—raising the real risk of potential incarceration for a company's employees and executives.

To frame the potential impact of the Act and reforms, consider a few recent whistleblower settlements and verdicts. First, AstraZeneca settled a whistleblower claim over its marketing of an antipsychotic therapy for $520 million. The employee who blew the whistle stands to obtain $45 million from that settlement.[6] Remarkably, this same employee had only recently also blown the whistle on his former employer, Eli Lilly, also relating to its marketing of its antipsychotic. Eli Lilly settled that claim for $1.4 billion, and this same whistleblower stands to obtain a portion of the $100 million reserved for the whistleblowers from that settlement.[7] Second, GlaxoSmithKline ("GSK") entered into a criminal guilty plea and settlement for alleged labeling and product violations that were initially raised internally by an employee who was subsequently terminated in what was referred to as "a 'redundancy' related to [a recent merger]."[8] The whistle-blowing former employee secured at least $96 million in what is "believed to be the largest award given to a single whistleblower in U.S. history."[9] Third, two former in-house intellectual property attorneys recently secured a combined $2.2 million jury verdict in a whistleblower retaliation action against International Game Technology ("IGT").[10]

In light of the reforms, significant awards, and stepped-up enforcement efforts, the question naturally becomes what proactive approaches are available to employers who are likely to be confronted with whistleblower lawsuits, and what are some of the issues these approaches create. The initial volley for this question requires an assessment of the recent legislative reforms. In light of the substantial awards and protections afforded by the reforms, it quickly becomes evident that a prudent ready position[11] entails developing a robust internal compliance/whistleblower system that allows employers to uncover fraudulent behavior by encouraging whistleblowers to report fraud within the organization. Employers also must prepare to rally against corporate bounty hunters by developing strategies regarding how they will approach the parallel investigations and proceedings generated by whistleblower claims.

I. Recent Legislative Reforms: Protecting and Incentivizing the Corporate Bounty Hunter

One of the key legislative reforms helping to create a "cottage industry" of whistleblowing is the Dodd-Frank Act.[12] In a nutshell, Dodd-Frank provides enhanced incentives and protections to a whistleblower that provides "original information" to the Securities and Exchange Commission ("SEC")[13] leading to a successful judicial or administrative enforcement action resulting in over $1 million in monetary sanctions.[14] The Act's bounty program is the central incentive included in the legislation. Under the Act, the SEC must pay a qualified whistleblower between ten to thirty percent of the amount of monetary sanctions that the SEC and other authorities are able to collect.[15] In determining the amount of the award, the SEC will consider (1) the significance of the information provided to the success of the action; (2) the degree of assistance provided by the whistleblower; (3) the programmatic interest of the Commission in deterring securities law violations by making awards to whistleblowers; and (4) whether the award otherwise enhances the SEC's ability to enforce the federal securities laws.[16] While there is no requirement that a whistleblower utilize an employer's internal compliance/whistleblower system, "the proposed rules include provisions to discourage employees from bypassing their own company's internal compliance programs."[17]

The Dodd-Frank Act provides considerable protections for employees that engage in whistleblowing. Under the proposed rules,[18] a whistleblower is generally entitled to protection from discharge, demotion, suspension, threats, harassment, and other forms of discrimination regarding the terms and conditions of employment.[19] Whistleblowers may institute a private right of action with a six-year, and potentially up to ten-year, statute of limitations, and, significantly, they have the right to a jury trial.[20] After Title VII of the Civil Rights Act of 1964 ("Title VII") was amended to add the right to a jury trial, employment discrimination claims skyrocketed.[21] If history is a guide, it is very likely that the addition of a jury trial right under the Dodd-Frank Act will also result in a dramatic increase in whistleblower claims. Finally, for purposes of the statute's antiretaliation provision, the requirement that a whistleblower provide "information to the [SEC]" is satisfied if "an individual provides information to the [SEC] that relates to a *potential violation* of the securities law."[22]

The Dodd-Frank Act provides several significant amendments to the whistleblower protections available under Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX").[23] First,

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the Dodd-Frank Act provides that an individual instituting an action under SOX is entitled to a jury trial.[24] As discussed above, this is a significant entitlement that is likely to lead to a sharp rise in whistleblower suits under SOX.[25] The Act also increases the statute of limitations for filing a complaint from ninety to 180 days and extends the limitations period to include the period "after the date on which the employee became aware of the violation."[26] Furthermore, the Dodd-Frank Act eliminates an employer's ability to enforce waivers of a whistleblower's rights or remedies or require arbitration of claims of retaliation through pre-dispute agreements[27]—a process that an observer notes has proven to be beneficial to both sides of the bar in employment discrimination actions.[28]

In addition, the Act and a recent United States Department of Labor Administrative Review Board ("Board") opinion eliminate the debate over whether the employees of a publicly-traded company's subsidiaries and affiliates are covered by SOX. In *Johnson v. Siemens Building Technologies, Inc.*,[29] the Board held that the whistleblower provisions of SOX extend to a non-public subsidiary whose financial information is included in the consolidated financial statements of its publicly-traded parent.[30] The Board observed that, prior to the Dodd-Frank Act, "[s]ignificant conflicts [developed] in the case law interpreting pre-amendment Section 806's coverage of subsidiaries."[31] "Opinions [ranged] from near universal subsidiary coverage to no coverage for subsidiaries."[32] The Dodd-Frank Act amendments provide a degree of clarity by extending the retaliation protections of SOX to employees of subsidiaries and affiliates of public companies "whose financial information is included in the consolidated financial statements of [the] company."[33] The Board's decision in *Johnson* and the Dodd-Frank Act amendments clearly illustrate that organizations must monitor and provide programs for certain public *and private* subsidiaries and affiliates within their portfolio.

Recent amendments to the FCA also increase the likelihood that employers will confront corporate bounty hunters. As a general matter, the FCA provides for liability for triple damages and a penalty from $5,000 to $10,000—"as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990"—per claim for anyone who knowingly submits or causes the submission of a false or fraudulent claim to the United States.[34] In 2009 and again in 2010, the FCA was amended to broaden both the substantive provisions of the FCA and increase protection for whistleblowers.[35] To the potential dismay of employers, the intended effect of the 2009 and 2010 amendments is to expand liability and make it easier to investigate claims and win recoveries under the FCA.[36]

The recent changes to the whistleblower landscape coincide with a general shift in increasing employment claims and, specifically, retaliation claims. Nationally, workplace discrimination retaliation claims "have increased by 60 percent over the past five years . . . ."[37] The origin of this increase can be traced back to the United States Supreme Court's ruling in *Burlington Northern & Sante Fe Railway Company v. White*,[38] which broadened the standard for determining the type of conduct that constitutes retaliation under Title VII. The Court has continued to broaden the scope of retaliation protections available under anti-discrimination statutes. In three separate opinions from the October 2010 term alone, the Court held that (1) Title VII's antiretaliation provision protects a co-worker who is a relative or close associate of an employee;[39] (2) an employer may be held liable under the "cat's paw theory" of liability for discrimination perpetuated by an employee other than the primary decision-maker;[40] and (3) the FLSA's anti-retaliation provision protects written and oral complaints.[41]

II. Finding Ready Position—Developing a Robust Internal Compliance/Whistleblower System

In light of the various reforms, employers seeking a sound ready position have an incentive to adopt and implement a robust internal compliance/whistleblower system.[42] The primary reasons for adopting a robust whistleblower system include protecting the reputation of the business and the business reputation of both the directors and the CEO.[43] As the corporate scandals of the last decade illustrate, corporations and independent boards of directors cannot simply rely upon senior management for information about fraudulent behavior.[44] This empirical observation is buttressed by a 2007 PricewaterhouseCoopers ("PwC") survey—which observed that internal controls designed to detect fraud, alone, are insufficient.[45]

Thus, employers should have an effective system that allows employees to communicate up the chain and should create a corporate culture that inspires internal reporting. Internal compliance/whistleblower systems are not new. SOX historically required that public companies, whose securities are listed, establish an internal compliance program. But, after SOX, "many public companies merely adopted a 'paper' whistleblower policy . . . ."[46] These paper policies do not really provide the benefits sought by employers and actually may militate against the central finding noted in the PwC survey—that whistleblowers are one of the most effective sources for detecting and rooting out fraudulent activities.[47]

There are a number of core elements that should be included in a robust internal compliance/whistleblower system.[48] First, employers should provide training to all employees regarding the system on a regular and reoccurring basis. Confidentiality is also of paramount importance. All employers implementing a robust internal compliance/whistleblower system must create internal safeguards that, to the fullest extent possible, protect the identity of the whistleblower.[49] In addition, the recent legislative reforms provide an incentive for employers to create monetary awards to hedge against corporate bounty hunters. Rather than external reporting in the hopes of obtaining some piece of a large settlement (as noted above), employers should consider rewarding internal whistleblowers by creating and publicizing the potential to receive a substantial monetary award for disclosing fraudulent behavior *inside* the organization. For example, employers could offer a prospective whistleblower a comparable percentage—ten to thirty percent—of the money saved by the whistleblower's internal report.[50] It may well be difficult for any employer to compete with the astronomical bounties that are available under the Act or the FCA,[51] but for every employee who reports externally, there likely are many more employees who would prefer to report internally and maintain their belief that the organization is a good corporate

citizen.[52] Employers should also dedicate time and energy to determining how the robust system will be administered. Retaining outside counsel, whose engagement is limited to administering the system, may serve to both insulate an organization through the use of the attorney-client privilege and work product doctrine and provide legitimacy to the system in the eyes of the whistleblower.[53]

Although there are numerous benefits associated with a robust internal compliance/whistleblower system, there is a downside risk vis-à-vis workforce management. Even the most ardent advocates of a robust system recognize that certain employees may attempt to use the system as a shield—by raising baseless allegations in order to impede an otherwise legitimate employment termination or disciplinary process.[54] A robust internal system also raises the risk that employers will be forced to aggressively investigate every single allegation without any threshold considerations of materiality. Certainly, it is easy to dismiss these concerns as mere collateral damage associated with an effective compliance program. Yet, meritless claims can significantly burden employers by requiring the expenditure of considerable resources investigating the merits of the claim and by forcing managers to deal with unproductive and/or disruptive employees. Employers who adopt a robust system, however, are not completely helpless. As discussed below, many of the antiretaliation provisions found in the various federal statutes protecting whistleblowers permit employers to terminate a whistleblower if they have clear and convincing evidence that they would have terminated the employee notwithstanding their report. For instance, in *Giurovici v. Equinix, Inc.*,[55] the Board concluded that the employer established that a termination was backed by clear and convincing evidence where the record showed that the complainant had a documented decline in job performance and demonstrated instances of insubordination.[56] Likewise, in *Tides v. Boeing Company*,[57] the District Court held that the employer presented clear and convincing evidence supporting termination where two former employees disclosed confidential information to the media.[58] Therefore, traditional workforce management best practices—such as consistently enforcing workplace policies, documenting all performance related issues, and establishing policies to protect confidential information—take on greater importance when finding ready position relating to whistleblower issues.

III. Rallying Against the Corporate Bounty Hunter—Preparing for Parallel Investigations and Proceedings

As a general matter, employers must be prepared for three kinds of parallel proceedings when the whistle blows.[59]

First, employers must be prepared for investigations of an active whistleblower's allegations. Internally, this raises a number of considerations. For instance, employers must determine when and how to engage independent counsel. As discussed above, having dedicated counsel to administer the system is one means of preparing for the investigation. If dedicated counsel is not in place, retaining outside counsel that has not advised the independent board of directors may serve to provide a similar layer of privilege protections. Employers also must consider what type of documentary evidence needs to be compiled, and they must determine how to use the evidence strategically. Moreover, employers need to work diligently to determine the merits of the claim—both in an effort to identify and eliminate fraudulent behavior within the organization and to determine whether the report was submitted in an effort to impede an employee's termination.

Although employers need to respond to a whistleblower's allegation(s) promptly, the circumstances from the investigation at French car maker Renault AG serves as a case study for why employers must be cautious not to act too quickly. The investigation commenced after several top managers received an anonymous tip alleging that a senior executive negotiated a bribe. In what observers view as a snap judgment, Renault terminated the executive and two other managers following a brief four-month investigation of the allegations. Despite the professed innocence of the employees, Renault's CEO publicly stated that the company possessed evidence against them. But the company ultimately failed to uncover any evidence against the dismissed employees—either before or following their termination. Although the company is said to be preparing to exonerate employees, one can reasonably assume that the negative repercussions of this snap judgment are just beginning to emerge.[60]

Externally, employers must prepare for investigations by administrative agencies and be strategic about a number of issues raised by the investigation. The agency's investigation findings could, potentially, serve as the basis for whether or not the employer is liable for fraudulent activity occurring within the organization. The findings may also serve as a key piece of evidence in any litigation regarding the propriety of an employer's subsequent termination of the whistleblower.[61]

Second, employers need to prepare for the possibility of an administrative investigation into claims of retaliation.[62] Although the enforcement agency and procedures will vary by statute, the procedures utilized by the Department of Labor ("DOL")—the main federal enforcement agency—provide a basic framework. For the most part, the DOL has delegated the authority to investigate whistleblower retaliation complaints under the statutes it enforces to the Occupational Safety and Health Administration ("OSHA").[63] Each law OSHA administers generally requires that a complaint be filed within a certain number of days of the alleged retaliation.[64] Thereafter, OSHA generally must attempt to complete its investigation within thirty days of receiving the complaint.[65] OSHA utilizes a common prima facie framework for evaluating liability.[66] Should OSHA determine that a violation has occurred, it will issue a determination and preliminary order for relief that is subject to de novo review.[67] In addition, employers must consider that certain statutes, such as SOX, permit a whistleblower to terminate the investigation and file a civil action in federal court if a final decision is not rendered within a certain number of days.[68]

A key component of OSHA's investigatory function is acting as a gatekeeper to dispose of meritless complaints. To that end, if the whistleblower fails to establish a prima facie case, then the complaint will be dismissed without investigation.[69] Even if a whistleblower establishes a prima facie case, employers still possess an alternative. OSHA must terminate an investigation "if the employer demonstrates, by

clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior."[70]

Third, employers must prepare for the possibility of parallel civil and criminal proceedings generating a plethora of complex legal and practical considerations. Managing negative publicity, liaising with prosecutors *and* investigators, and the possibility of being confronted with formal civil and judicial proceedings can overwhelm any organization—regardless of size or staffing. Employers also need to give serious consideration to how they will handle the matter from a public relations perspective. Investigating agencies, such as the SEC or Department of Justice, will likely issue a press release regarding charges or complaints they file against an employer.[71] Therefore, employers should be prepared to respond in a manner that minimizes the impact of the agency's release.

As whistleblower claims continue to focus on potential monetary windfalls to employees and former employees and employment discrimination/retaliation, a reactionary approach by employers becomes a less viable option. Rather, employers should be proactive in detecting and rooting out fraudulent behavior within the organization, while also guarding against any negative reaction and/or employment fallout to the whistleblowing employee.[72]

Endnotes

1 *See, e.g.,* Robert C. Blume et al., *2010 Year-End False Claims Act Update: Part 1*, Westlaw News & Insight (BETA)—National Litigation, *available at* http://westlawnews.thomson.com/National_Litigation/Insight/2011/03_-_March/2010_year-end_False_Claims_Act_update___Part_1/ (discussing sharp and sudden rise in False Claims Act litigation in 2010) (last visited Apr. 11, 2011).

2 Pub. L. No. 111-203 (2010).

3 Eamon Javers, *Whistleblowers: The New Bounty Hunters—Using Greed—and Lots of Cash—to Fight Greed*, CNBC, Feb. 8, 2011, *available at* http://www.cnbc.com/id/41257939.

4 *See* SECSnitch.com, http://www.secsnitch.com/ (listing theaters in New York displaying commercial along with the movie Wall Street 2—Money Never Sleeps) (last visited Apr. 10, 2011).

5 Stephen M. Kohn, The Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself (2011).

6 *Whistleblower Twice Over: First Lilly, Now AstraZeneca*, WSJ.com, Apr. 28, 2010, *available at* http://blogs.wsj.com/health/2010/04/28/whistleblower-twice-over-first-lilly-now-astrazeneca/tab/print/.

7 *Id*.

8 Peter Loftus, *Whistleblower's Long Journey—Glaxo Manager's Discovery of Plant Lapses in 2002 Led to Her $96 Million Payout*, Wall St. J., Oct. 28, 2010, at B1.

9 *Id*.

10 *See* Van Asdale v. Int'l Game Tech., No. 3:04-CV-0703-RAM, Docket Entry No. 316-317, 321 (D. Nev. Feb. 8, 2011) (providing jury verdicts and judgment). Among the potential lessons learned from *Van Asdale* is the reminder that the timing of an adverse action may provide an inference of discrimination. *See* Van Asdale v. Int'l Game Tech., 577 F.3d 989, 1003-05 (9th Cir. 2009) (reversing summary judgment and remanding where employees' termination in close proximity to reporting potential fraud raised a genuine issue of material fact regarding whether their protected activity was a contributing factor to their terminations).

11 "Ready position" is a tennis term of art describing the sport's fundamental position that prepares a player for their shot, whether it be a return of serve, a groundstroke, or a volley. BBCSport.com, Tennis—Skills, http://news.bbc.co.uk/sport2/hi/tennis/skills/4230606.stm (last visited Apr. 12, 2011). "If your ready position is wrong, then you have little chance with the rest of the shot." *Id*.

12 The Dodd-Frank Act was signed into law on July 21, 2010. *See supra* note 2. Whistleblowers may be entitled to an award for information provided on or after July 22, 2010. U.S. Securities and Exchange Commission, Dodd-Frank Spotlight—Whistleblower Program, http://www.sec.gov/spotlight/dodd-frank/whistleblower.shtml ("A whistleblower may be eligible to receive an award for original information provided to the Commission on or after July 22, 2010, but before the whistleblower rules become effective, so long as the whistleblower complies with all such rules once effective.") (last visited Apr. 11, 2011). The final regulations implementing the Act's whistleblower provisions are due on April 21, 2011. *See* Pub. L. No. 111-203, § 924(a) (ordering final regulations to be issued "not later than 270 days after the date of enactment of this Act"); Dodd-Frank Spotlight—Whistleblower Program, *supra* (noting that regulations implementing Dodd-Frank's whistleblower provisions "are required to be adopted no later than April 21, 2011") (last visited Apr. 11, 2011).

13 The Act provides a similar set of protections and incentive to whistleblowers who report violations of the Commodities Exchange Act to the Commodities Futures Commission. Pub. L. No. 111-203, § 748. With the exception of a shorter statute of limitations—two years—the protections and incentives essentially mirror those provided to whistleblowers who provide original information to the SEC under § 922. *Id*.

14 Pub. L. No. 111-203, § 922. Original information means that the information

> (A) is derived from the independent knowledge or analysis of a whistleblower; (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

Id.

15 Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 17 C.F.R. Parts 240 and 249, Release No. 34-63237, at § 240.21F-5 (Nov. 3, 2010) [hereinafter Proposed Rules].

16 *Id*. at § 240.21F-6.

17 SEC Proposes New Whistleblower Program Under Dodd-Frank Act, Release 2010-213, *available at* http://www.sec.gov/news/press/2010/2010-213.htm (last visited Apr. 12, 2011). The provisions include allowing a whistleblower to preserve their "place in line" by treating an employee as a whistleblower under the SEC program as of the date that they report information internally—provided that the employee provides the same information to the SEC within ninety days—and awarding higher percentage awards to employees who first report through "effective company compliance programs." *Id*.

18 Dodd-Frank Spotlight—Whistleblower Program, *supra* note 12 (discussing controlling nature of proposed rules) (last visited Apr. 11, 2011).

19 Specifically, the Act provides:

> 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— (i) in providing information to the Commission in accordance with this section; (ii) 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 (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Pub. L. No. 111-203, § 922.

20 *Id*.

21 Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103, 123-25 (2009) (noting that employment discrimination claims continue to be more likely to go to trial than non-job claims and categorizing increase in jury trial claims as "dramatic" following 1991 addition of a right to jury trial); Martha Halvordson, *Employment Arbitration: A Closer Look*, 64 J. Mo. B. 174, 174 (Jul.-Aug. 2008) (observing that number of discrimination charges filed "skyrocketed" after jury trials added to employment discrimination causes of action).

22 Proposed Rules, *supra* note 15, at § 240.21F-2.

23 Pub. L. No. 111-203, § 922. For purposes of SOX's whistleblower protection provision, the statute generally protects an employee who provides information regarding any conduct "which the employee *reasonably believes*" constitutes a violation of the Securities Exchange Act. 18 U.S.C. § 1514A(a) (emphasis added).

24 Pub. L. No. 111-203, § 922.

25 *See supra* note 21 and accompanying text.

26 Pub. L. No. 111-203, § 922. Employers also need to consider whether actions they undertake may serve to toll the statute of limitations. *See* Hyman v. KD Resources, No. 09-076, 2010 DOLSOX LEXIS 27, at *17-21 (Arb. Mar. 31, 2010) (holding that *pro se* complainant's otherwise untimely filing tolled where employer led complainant to "reasonably believe that he would be returned to his former employment or alternatively given a one-year consulting contract, that he would be financially compensated for having been wrongfully terminated (including payment of back salary), and that [the employer] would resolve the SOX compliance issues that [complainant] had raised").

27 Pub. L. No. 111-203, § 922.

28 Halvordson, *supra* note 21, at 181.

29 ARB Case No. 08-032, ALJ Case No. 2005-SOX-015 (Mar. 31, 2011).

30 *Id*.

31 *Id*.; *see also* Jay P. Lechner, *Sarbanes-Oxley Whistleblower Provisions: A Study in Statutory Construction*, Engage, Oct. 2007, at 121-23 (discussing divergent views of whether SOX's retaliation protections extended to employees of a subsidiary).

32 *Johnson*, ARB Case No. 08-032, ALJ Case No. 2005-SOX-015.

33 Pub. L. No. 111-203, § 929A. Prior to the Dodd-Frank Act, publicly-traded company was defined under SOX as a "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934. . . ., or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934. . . ."

34 31 U.S.C. § 3729(a)(1). On the civil side, the FCA permits a private person ("relator") to bring a civil action on behalf of the United States, where the relator has information that the named defendant has knowingly submitted or caused the submission of false or fraudulent claims to the United States. 31 U.S.C. § 3730(b)(1).

35 John T. Boese, Civil False Claims and Qui Tam Actions § 1.09-.10 (4th ed. 2011).

36 *Id*. For instance, the 2009 amendments eliminated defenses developed by courts and the 2010 amendments expanded the original source exception. *Id*. In addition, the Dodd-Frank Act expanded the FCA's retaliation protections by supplying a uniform three-year statute of limitations period and by extending the protections to those associated with a whistleblower in furtherance of an FCA action or who participate in an effort to stop a violation of the FCA. Pub. L. No. 111-203, § 1079A.

37 Jeff Blumenthal, *EEOC Complaints Spike: Claims Rise in Nation, Phila. Area*, Phila. Bus. J., Mar. 11, 2011, *available at* http://www.bizjournals.com/philadelphia/print-edition/2011/03/11/eeoc-complaints-spike.html (last visited Apr. 11, 2011).

38 548 U.S. 53 (2006).

39 Thompson v. North American Stainless, 131 S. Ct. 863 (2011).

40 Staub v. Proctor Hospital, _ U.S. _ (Mar. 1, 2011).

41 Kasten v. Saint-Gobain Performance Plastics Corp., _ U.S. _ (Mar. 22, 2011).

42 For a complete discussion of the advantages and disadvantages of a robust whistleblower system, see generally Frederick D. Lipman, Incentives, Disincentives and Business Protection Strategies (forthcoming J. Wiley & Sons 2011) (manuscript on file with authors).

43 *See generally id*. (discussing reasons for adopting a robust whistleblower system).

44 *See id*. at ch. 6 (discussing independent board of directors' inability to rely solely upon senior management for information about fraudulent behavior).

45 PriceWaterhouseCoopers, The 4th Biennial Global Economic Crime Survey—Economic Crime: People, Culture and Controls 10-13 (2007) [hereinafter PwC Survey]. The PwC Survey is based on a survey of corporate executives at more than 5400 companies in over forty countries. *Id*. at a3.

46 Lipman, *supra* note 42, at ch. 7.

47 PwC Survey, *supra* note 45, at 22-24.

48 For a comprehensive list of best practices, see Lipman, *supra* note 42, at ch. 7; PwC Survey, *supra* note 45, at 23.

49 *See* Lipman, *supra* note 42, at ch. 7 (discussing ways in which an employer may preserve confidentiality, such as by indemnifying a legitimate whistleblower up to a reasonable limit or forming an entity to protect the whistleblower's identity).

50 According to a survey by the Society for Human Resource Management (SHRM), some employers have started offering incentives to employees to encourage internal reporting. *See* Dori Meinert, *Whistleblowers: Threat or Asset?—Be Prepared Lest Lawsuits Proliferate*, HR Mag., Apr. 2011, at 32 (reporting SHRM poll finding that three percent of respondent employers have developed internal incentive programs).

51 See *supra* notes 6-10 and accompanying text for a discussion of extraordinary recoveries recently secured under the FCA.

52 *Glaxo Whistle-Blower Lawsuit: Bad Medicine*, CBSNews.com, Jan. 2, 2011, *available at* http://www.cbsnews.com/stories/2010/12/29/60minutes/main7195247_page4.shtml?tag=contentMain;contentBody (noting that following her termination Ms. Eckard was "[s]till worried about patient safety, [and, therefore, she] took the same information she had sent to her Glaxo bosses and turned it over to the FDA") (last visited Apr. 11, 2011). In fact, recent surveys show that almost ninety percent of eventual whistleblowers attempt to raise their concerns internally before going outside of the organization. *See* Meinert, *supra* note 50, at 30 (discussing surveys conducted by the National Whistleblowers Center and Ethics Resource Center). Furthermore, researchers in the health care industry have found that whistleblowers are motivated by altruism, public safety, justice, self-preservation, and—most importantly—integrity. *Id*. at 28.

53 Lipman, *supra* note 42, at ch. 7.

54 *Id*. at ch. 6.

55 No. 07-027, 2008 DOL Ad. Rev. Bd. LEXIS 180 (DOL Ad. Rev. Bd. Sept. 30, 2008).

56 *See id*. at *17-21 (discussing employer's compliance with "clear and convincing" affirmative defense despite complainant's inability to establish that he engaged in a protected activity under SOX).

57 No. C08-1601-JCC, 2010 U.S. Dist. LEXIS 11282 (W.D. Wash. Feb. 9, 2010).

58 *See id.* at *5-11 (holding that disclosures to media are not protected SOX activity and that employer established by clear and convincing evidence that employees dismissal for leaking confidential documents to media was not pretextual).

59 Daniel P. Westman & Nancy M. Modesitt, Whistleblowing—The Law of Retaliatory Discharge Ch. 9.VI (2d ed. 2004 & Supp. 2010).

60 Ashby Jones & Joann S. Lublin, *Firms Revisit Whistleblowing*, Wall St. J., Mar. 14, 2011, at B5.

61 *See* Westman & Modesitt, *supra* note 59, at ch. 9.VI (2d ed. 2004 & Supp. 2010) (illustrating how findings of administrative investigation could serve as key piece of evidence regarding whether a whistleblower reported an alleged violation in good faith).

62 There are a multitude of federal and state statutes that provide antiretaliation protections for employees that engage in whistleblowing activities. *See id*. at Appendix B-C (cataloging state and federal statutes protecting whistleblowers employed in the private sector).

63 OSHA's Whistleblower Investigations Manual setting forth the procedures governing OSHA investigations of retaliation under each statute it administers is available at http://63.234.227.130/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3016 [hereinafter OSHA Whistleblower Manual].

64 For instance, a complaint under the Surface Transportation Assistance Act, 49 USC § 31105, may be filed by telephone or in writing within 180 days of the alleged retaliation. OSHA Whistleblower Manual, at ch. 10. Likewise, a complaint under SOX must be filed *in writing* within 180 days of the alleged retaliation. *See* OSHA Whistleblower Manual, at ch. 14 (providing general investigation procedure); Dodd-Frank Act § 922(c)(1)(A)(i), amending 18 U.S.C. § 1514A(b)(2)(D) (amending statute of limitations under SOX) (emphasis added).

65 Certain statutes, such as SOX, provide a sixty-day investigation period.

66 With respect to the whistleblower's prima facie case, OSHA's investigation must reveal (1) that the employee engaged in protected activity; (2) that the employer knew about the protected activity; (3) that the employer took an adverse action; and (4) that the protected activity was a contributing factor in the decision to take the adverse action. Westman & Modesitt, *supra* note 59, at 230.

67 *Id*. at 242-43. Relief may include reinstatement, back pay, and fees and costs. *Id*. at 242. However, courts continue to recognize that reinstatement may be impractical. *See* Solis v. Tenn. Commerce Bancorp, Inc., No. 10-5602, 2010 U.S. App. LEXIS 15302, at *3 (6th Cir. May 25, 2010) (concluding that harm to company if forced to reinstate outweighed harm to former employee).

68 *See, e.g.*, Stone v. Instrumentation Lab. Co., 591 F.3d 239, 240, 249 (4th Cir. 2009) (holding in case of first impression that whistleblower entitled to seek de novo review in federal court under SOX unless DOL issues a final order within 180 days of administrative complaint filing); OSHA Fact Sheet—Filing Whistleblower Complaints under the Sarbanes-Oxley Act, *available at* www.osha.gov/Publications/osha-factsheet-sox-act.pdf ("If a final agency order is not issued within 180 days from the date the employee's complaint is filed, then the employee may file it in the appropriate United States district court.") (last visited Apr. 11, 2011).

69 29 C.F.R. § 1980.104(b).

70 *See, e.g.*, 49 U.S.C. § 42121(b)(ii) (discussing investigation under AIR21). See *supra* notes 55-58 and accompanying text for an example of an employer satisfying clear and convincing evidence standard.

71 *See, e.g.*, SEC Charges Johnson & Johnson with Foreign Bribery, Exchange Act Release No. 2011-87 (Apr. 7, 2011), *available at* http://www.sec.gov/news/press/2011/2011-87.htm (announcing SEC charges under the Foreign Corrupt Practices Act ("FCPA")); Press Release, U.S. Department of Justice, United States Joins Suit Against Community Health Systems Inc. and Three of Its Hospitals in New Mexico (Mar. 6, 2009), *available at* http://www.justice.gov/opa/pr/2009/March/09-civ-200.html (announcing DOJ intervention in FCA suit).

72 On May 25, 2011, the SEC adopted the final rules for implementing the whistleblower provisions of Section 21F of the Securities Exchange Act of 1934. Although the final rules contain several revisions to the proposed rules discussed in this article, the revisions are, for the most part, de minimis. For example, the final rules continue to encourage—but still do not require—a whistleblower to report possible violations of federal securities laws internally before contacting the SEC directly. In addition, even though the final rules extend the time period in which a whistleblower may preserve their "place in line" from ninety to 120 days, the modest increase will continue to place significant pressure on an employer's ability to conduct an effective and comprehensive internal investigation. With respect to the definition of whistleblower and the antiretaliation protections of the Act, the final rules replace the term "potential violation" with "possible violation" that "has occurred, is ongoing, or is about to occur" and add a "reasonable belief" requirement. *Compare* notes 12-22 and accompanying text.