

Walk, Don't Run

EXPERTS ADVISE PRUDENCE AND CAUTION FOR POTENTIAL WHISTLEBLOWERS

By Lori Pizzani

If you are on the precipice of considering officially blowing the whistle about some illegal or wrongful activity at an employing firm or within an organization or group you belong to, stop and think hard first. That's the advice of experts who urge an abundance of caution before blowing the whistle and undertaking the often lengthy and laborious process.

"Whistleblowers' decisions are often life changing and shouldn't be made without the counsel of others and not just legal counsel," says Dan Lawton of the Lawton Law Firm in San Diego. He is currently representing an invest-

ment professional who has a whistleblower anti-retaliation lawsuit in the California court system.

"Whistleblowers need to understand what their rights are, what the laws are, and under what instances they can be protected by anti-retaliation provisions," says Tammy Marzigliano, partner and co-chair of the whistleblower and retaliation practice at the New York law firm Outten & Golden. Clients often tell her that this or that activity they uncovered was definitely wrong and that they consequently blew the whistle. Much to their surprise, she sometimes has to tell them that what they blew the whistle about (mismanagement, for example) is not illegal and they would not be protected under whistleblower provisions. "However,

something like mismanagement because management was cooking the books or for shareholder fraud is illegal, and for each [type of case], the whistleblower laws could protect them," she adds.

PROGRAMS AND PROVISIONS

The numbers tell a compelling story. Over the fiscal year ending 30 September 2012, the Office of the Whistleblower at the U.S. Securities and Exchange Commission (SEC) received 3,001 whistleblower tips from people in 49 countries. Perhaps as a reaction to so many cases, misconceptions have arisen about whistleblowers and their motives.

"The biggest myth is that individuals that work for corporations are looking for ways to disclose unlawful activities and are motivated by the pursuit of riches or wealth," says Scott Oswald, managing partner of The Employment Law Group, headquartered in Washington, DC. "But the reality couldn't be further from the truth. Most people aren't looking to blow the whistle." Rather, most are high-level executives who see themselves as team players and want to responsibly report the activity they believe is wrong. "They want to know how to best disclose the activity so that the company can remedy the problem," he adds. Most often, these individuals have already tried to disclose internally at their employer (usually to a compliance officer).

Oswald notes that most potential whistleblowers he counsels truly want to know how to protect themselves should they take the next step and blow the whistle externally. "It gives the individual an avenue of redress if the company doesn't do the right thing," says Oswald.

"The type of whistleblowers we now see is a phenomenon of this new paradigm, the likes of which we haven't seen in the last ten years or even in the last five," says Neil Getnick, managing partner of New York law firm Getnick & Getnick LLP. In many corporations, compliance is viewed as a cost center and in a negative light in that it dictates what a company cannot do. But he believes that a business-integrity program can operate as a profit center when tied to the positive missions of the company through integrity, transparency, good governance, and social responsibility. "The goal is to show that good ethics is good business," he says. "I think we are seeing some public companies embracing this, but not all companies across the board. By failing to do so, companies leave themselves vulnerable. That's where you'll likely see some whistleblower cases arise." One key aspect of measuring the business integrity of a company is how it perceives internal whistleblowers. "Are they honored? Taken seriously?" Getnick asks.

In the U.S., several different whistleblower programs are available, depending on the nature of the unlawful act, including claims against U.S. government fraud (Federal False Claims Act), tax fraud (U.S. Internal Revenue Service), and the whistleblower programs at the U.S. SEC (for those breaking securities laws) and at the U.S. Commodity Futures Trading Commission (for violations of the Commodity Exchange Act). Each type of whistleblower program comes with its own set of rules, procedures, and paperwork. In addition, a qualifying whistleblower may be eligible for a monetary award or protection under anti-retaliation provisions.

The newest whistleblower provision, which took effect in November 2012, is the Whistleblower Protection Enhancement

KEY POINTS

Whistleblowers are often misunderstood and face numerous personal, professional, and legal difficulties.

Before becoming a whistleblower, investment professionals should make sure they understand all the implications, seek appropriate counsel, and act cautiously and prudently rather than precipitously.

Programs and provisions for whistleblowers, including anti-retaliation laws, have expanded in recent years, but laws and regulations can vary widely depending on jurisdiction and the type of activity involved.

Act. The law closes loopholes and offers protection to certain federal government employees.

The biggest problem is that “the typical whistleblower isn’t typically cognizant of the laws,” says Carney Shegerian, founder of the law firm Shegerian & Associates in Santa Monica, California. Thus, seeking counsel from an attorney who is knowledgeable and experienced with shifting whistleblower laws and cases can be critical. An effective legal strategy will consider where (in which venue and court) a particular case should be filed. For example, Boston and Philadelphia are nationally known for cases involving health-care companies and the Southern District Court of New York is known for cases involving breaches of securities law.

“The most important first step is to consult a lawyer because there are so many pitfalls and procedures in order to protect your rights. It’s a minefield,” says Robert Sadowski, a senior counsel in the New York office of Diamond McCarthy. “Some people need to talk through the case with a lawyer to see if they really have a case.” Indeed, roughly 50% of Sadowski’s time is spent vetting cases.

All of the whistleblower lawyers who contributed to this article and virtually all whistleblower lawyers as a rule work on contingency. That means they will neither ask for nor take money from you when they counsel with you or agree to take your case. “The first rule of thumb is: never pay a lawyer up front for this type of case,” says Sadowski. “If you encounter an attorney asking for money up front, run!”

Lawyers who represent whistleblowers work with the expectation of getting paid later, often years later, once the whistleblower case has been resolved. If the whistleblower receives a monetary award, lawyers’ fees will be taken from that. In fact, most often, if the case is settled successfully for the whistleblower, those attorneys’ fees will be paid as part of the settlement by the defendant alleged to have committed the illegal act.

PRACTICAL DO’S AND DON’TS

For prospective whistleblowers, the consensus among experts points to nine critical do’s and don’ts:

1. **DO make sure that you really want to file a whistleblower claim.**

“Once it’s filed, it sets in motion something that you cannot stop,” says Erika Kelton, partner in the Washington, DC, law office of Phillips & Cohen. “It’s important to thoroughly reflect on, and be prepared to do, this and assess how long it will take, what to expect, how disruptive to your life this can be, and what risks you are taking.” Many things can happen on the long road to resolution, and patience and flexibility are necessary. Don’t let the whistleblower complaint *become* your life, advises Kelton: “Try to get back to some sense of normalcy.”

2. DO carefully consider career implications. “Some of the first questions I ask would-be whistleblowers are ‘Do you plan to stay in the profession?’ and ‘Do you need your job?’” says Sadowski. Determining whether a potential whistleblower

is willing to relocate or change professions and what that is worth to them in terms of time and money is important. “Sometimes, it is better to walk away, take the ethical high road, and not report the activity,” says Sadowski.

“There’s a difference between protecting your job and your career,” says Andrew Grosso, founder and principal of Andrew Grosso & Associates, a Washington, DC, law firm. “You may not want to leave your job. Going elsewhere can be difficult, but you can establish yourself at a new company.” He suggests that would-be whistleblowers don’t leave their current company without first obtaining a new job because it could be harder to get another job later on: “They need to give serious thought to protecting their careers by moving to another firm so that they are not blacklisted.”

3. DO be open and honest with your attorney. “Don’t withhold or filter information or documents, and give your attorney time to digest all of the material,” says Shegerian. “It’s also important to be factually accurate about what you are complaining about. Don’t spin or add mistruths.”

Would-be whistleblowers also need to come clean with their attorney as to whether they were involved in the fraud or even orchestrated it, according to Sadowski. Whistleblowers are sometimes asked if they tried to stop the fraud. In some cases, whistleblowers were just doing what they were told to do and later realized their actions were part of the wrongdoing or illegal activities. “Don’t participate in a fraud or feel pressured to, especially once you know it’s wrong,” counsels Randall Berger, an attorney in charge of the whistleblower practice at New York law firm Kirby & McInerney. And, he adds, don’t make any false statements with the hopes of protecting friends or co-workers.

4. DO prepare a list of evidence that can support your case. Documents, such as files you use and e-mails that have been routed to you, can be very valuable in supporting your case. But tread carefully, the experts advise. “You can prepare a list of evidence and witnesses and include what it is and where it is,” said Kelton. But don’t start rifling through filing cabinets and program files that you haven’t been privy to. Such actions can be construed as espionage, theft, or breach of confidentiality.

“Don’t take what you shouldn’t and don’t go where you don’t belong,” says Sadowski. “You don’t want to be someone who is accused of pilfering.”

5. DON’T wait too long to file your whistleblower case. “Act fairly quickly when you discover fraud, money laundering, or whatever,” says attorney Berger. A “first to file” rule protects the right to receive any monetary awards by barring other would-be whistleblowers from stepping up. Also, if you are fired or otherwise feel you have been retaliated against, watch the statute of limitations for filing an anti-retaliation lawsuit.

6. DON’T wait if you feel you’ve been retaliated against. There are many states and federal laws to protect whistleblowers from anti-retaliation. “If you feel something is ‘off,’ reach

THE FURTHER YOU GET AWAY FROM THE CLASSIC PARADIGM OF RETALIATION, THE MORE DIFFICULT IT IS TO PROVE. THAT'S A LARGER HURDLE FOR TRYING TO CLAIM RETALIATION.

out sooner rather than later to learn what your rights are,” says Marzigliano. “It’s harder when something adverse happens. You may be asking, ‘Did I miss out on a bonus because I blew the whistle?’”

7. DON'T blab or tweet to everyone or post your case on Facebook. “Don’t go posting things to your Facebook page and using social media to discuss your case,” says Kelton. Under certain cases, such as under the Federal False Claims Act, the whistleblower is required to remain silent while the investigation is being conducted.

Sending e-mails to your lawyers through the company e-mail system/server can be dangerous. “Do shut down communications with others at work and in your personal life, as these can be misconstrued,” says Shegerian. And make sure your personal life isn’t exposed to the whistleblower process, which means you shouldn’t confide the details to your favorite relative or a neighbor. They could become entangled and be requested to disclose what they know. “Keep yourself cocooned,” he counsels.

8. DON'T take your case to the media. “It can work in limited instances, but it’s not a good way to draw attention to a company,” attorney Berger says. “In rare cases, you can go to the press, but don’t do so without considering the ramifications and counseling with an attorney,” Kelton says.

“I’m not a fan of going to the media. It hampers the government’s investigation, which is often meant to be stealth[y],” Sadowski says.

9. DON'T expect a thank-you. There’s no gratitude for becoming a whistleblower. That’s why the awards are typically so large. “You are going to lose friends and alienate people, and you’ll be viewed as a turncoat and not a team player,” Sadowski says.

THE REALITY OF RETALIATION

Retaliation for blowing the whistle on alleged abuses can take a variety of forms—some nearly impossible to miss and others nearly impossible to detect, much less prove.

“The whistleblower is entitled to whistleblower protections against retaliation,” says Sean McKessy, chief of the SEC Office of the Whistleblower. That protection applies even if the whistleblower does not meet the criteria for securing a monetary award. Just as under Sarbanes–Oxley regulations enacted

in 2002, which protect employees of public companies who blow the whistle, retaliation is prohibited under Dodd–Frank Act rules that took effect in 2011 and established the whistleblower programs at the SEC and CFTC.

Retaliation can often take the form of a demotion, a reassignment, requiring an employee to move, or outright termination, all of which broadly fall under the umbrella of activities which are detrimental to the individual, according to McKessy.

More subtle actions can include seeking to have someone’s professional license revoked. The question becomes: Is it retaliation?

“The further you get away from the classic paradigm of retaliation, the more difficult it is to prove,” McKessy says. “That’s a larger hurdle for trying to claim retaliation.” While the SEC does have anti-retaliation powers, such as requiring someone to be reinstated in the position with the payout of two times backpay, that provision applies for obvious retaliation. In some cases, SEC whistleblowers may desire to bring a private legal action in federal court against their employer. The SEC may also file its own enforcement proceeding against an employer who has retaliated.

Oswald counsels clients that if a company has already retaliated, chances are the company will not reverse course. “Most sophisticated employers don’t do so blatantly by ushering the employee from the workplace. It might start with an accretion or reduction of duties where the individual ends up with little to do,” Oswald says. More often, in recent cases, Oswald has seen retaliation take the form of removing a professional’s security clearance or licensing (for example, in cases involving hospital employees). “This is the most pernicious but subtle form of retaliation because it goes to their licensing [and future employment abilities].” He also cautions professionals to be on guard for rumors aimed at discrediting the person and his or her reputation.

“I’ve also heard of houses being broken into, computers stolen, and companies hiring former government officials to do clandestine investigations,” Sadowski notes.

“The laws protecting employees against retaliation are constantly improving,” says Getnick. “But it’s more the norm that individuals are retaliated against in some shape or form. Only the whistleblower knows what life was like before and after.”

If you do blow the whistle, don’t delay career moves.

“Try to find a new job or career as quickly as possible,” says Lawton. “Plaintiffs often find themselves in a long war. Like David versus Goliath, the Goliath will fight you to the death in a long war designed to exhaust your resources and your will. They’d like to see the whistleblower die or go bankrupt.”

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KEEP GOING

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