

Retaliation and Whistleblower Claims by In-House Counsel

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With recent legislative efforts to expand whistleblower rights and protections, many employers have found themselves confronting an increase in the number of whistleblower reports, complaints, and lawsuits. As part of this trend, many employers are also beginning to see, or anticipate, whistleblower activity and retaliation claims among even their own corporate counsel and compliance professionals. These kinds of complaints, reports, and lawsuits brought by in-house attorneys present particular challenges and complications for the company. Can an attorney bring a claim or lawsuit against an employer that is also his or her client? Can the company's attorney collect a bounty award for acting as a whistleblower? Can the attorney-whistleblower disclose the company's confidential and privileged information as part of a claim or lawsuit? How should the company work with an attorney in the workplace who has reported internally or to the government, or who has filed a claim or lawsuit? What can the company do to prevent charges and lawsuits brought by in-house counsel?

These critical questions require careful consideration and a thorough understanding of the state of the law. This white paper provides an explanation of the extent to which in-house attorneys can bring retaliation or whistleblower claims, collect monetary incentives for whistleblowers, and use a company's confidential and privileged information to litigate a legal claim. Further, the paper identifies employer defenses in such litigation and steps an employer presented with a complaint or claim by an in-house attorney can take to protect its confidential information. Finally, we offer practical steps an employer can and should take when responding to and managing an in-house attorney who has made a complaint or filed a lawsuit while still employed, as well as practical recommendations for preventing such claims from arising at all.

Whistleblower Protections and In-House Counsel

Historically, some state courts have expressed skepticism about whether an in-house attorney can sue his or her employer (and client) on the basis of allegations that the employer terminated or otherwise retaliated against the attorney for engaging in statutorily protected activity. Increasingly, however, state and federal courts and federal agencies have allowed such claims and even permitted the disclosure of privileged and confidential information in the course of litigating them. The section below provides an overview of the permissibility of whistleblower claims by in-house attorneys and canvasses the types of information they may use to litigate their claims under various federal whistleblower statutes and in state common law wrongful termination actions.

Sarbanes-Oxley

The Sarbanes-Oxley Act (SOX or Sarbanes-Oxley), enacted in 2002 to introduce sweeping corporate reforms, contains civil and criminal anti-retaliation provisions intended to protect employees who blow the whistle on corporate fraud. Under SOX's civil whistleblower provisions, employees of publicly traded companies (and their privately held subsidiaries) who provide information and/or assist in an investigation into an employer's violation of SOX, Securities and Exchange Commission (SEC) regulations, or securities fraud are protected from employer retaliation.¹ Sarbanes-Oxley is enforced by the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor (DOL), meaning that employees must first file their claims with that agency. Claims of retaliation under SOX are investigated and adjudicated by OSHA, with ultimate review available in the U.S. Court of Appeals for the Federal Circuit.

Both the DOL's Administrative Review Board (ARB) and the U.S. Court of Appeals for the Ninth Circuit have allowed in-house counsel to pursue SOX retaliation claims. In *Van Asdale v. International Game Technology*, the Ninth Circuit held that two in-house attorneys could state a claim of retaliatory discharge under SOX.² The court rejected the defendant company's argument that the state's rules of professional conduct created a *per se* bar against such suits.³ The Ninth Circuit also rejected the idea that the claim should not go forward because it could not be litigated without disclosure of attorney-client privileged information. To address the issue of attorney-client privileged information, the court recommended equitable measures "to minimize the possibility of harmful disclosure."⁴ By way of example, the court indicated that

1 See 18 U.S.C. §§ 1513(e), 1514A(a).

2 577 F.3d 989 (9th Cir. 2009).

3 *Id.* at 995.

4 *Id.* at 995-96.

testimony could be limited to the alleged disclosures of shareholder fraud (*i.e.*, the protected activity), without referencing litigation-related discussions that also took place in the same meeting.⁵

In *Jordan v. Spring Nextel Corporation*, the ARB similarly allowed an in-house attorney to assert claims of retaliation under SOX, despite the fact that bringing the claim entailed disclosure of privileged and confidential information.⁶ The ARB reasoned that the mandatory disclosure requirements for counsel set forth in the Code of Federal Regulations title 17, section 205.3, which are described further below, and the whistleblower protections under SOX, should be read together to provide a remedy for attorneys alleging that they have been retaliated against for making a required disclosure.⁷ The ARB also noted that the SEC regulation regarding attorney disclosure of material violations was modeled on the American Bar Association's (ABA) Model Rules of Professional Conduct, Rule 1.6, which "allows an in house attorney to use privileged information to establish a retaliatory discharge claim against the attorney's employer."⁸ Consequently, "if an attorney reports a 'material violation' in-house in accordance with SEC's Part 205 regulations, the report, though privileged, is nevertheless admissible in a SOX Section 806 proceeding as an exception to the attorney-client privilege in order for the attorney to establish whether he or she engaged in SOX-protected activity."⁹ The ARB observed, however, that it remained within the ALJ's discretion to issue a protective order to preserve the confidentiality of the privileged communications offered to support the retaliation claim.¹⁰

The Dodd-Frank Act

Enacted in 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) ushered in expansive new incentives and protections for whistleblowers.¹¹ Under Dodd-Frank's amendments to the Securities Exchange Act (SEA), whistleblowers who voluntarily provide original information to the SEC, which leads to an SEC enforcement action and recovery of more than \$1 million, can collect a monetary award ranging between 10 and 30% of the monetary sanctions collected.¹² Whistleblowers also enjoy new protections from retaliation under Dodd-Frank. Specifically, a whistleblower possessing a "reasonable belief" that he or she provided information that "relates to a possible securities law violation" and suffers retaliation as a result can bring a claim of retaliation in federal court.¹³ For retaliation claims, Dodd-Frank provides a generous statute of limitations, ranging between six and 10 years, and remedies that include reinstatement, double back pay plus interest, attorneys' fees, litigation costs, and expert witness fees.¹⁴

Although Dodd-Frank places limitations on the entitlement of compliance professionals and company attorneys to collect bounty awards, as is described more fully below, it contains no special provisions regarding retaliation claims by in-house counsel. Furthermore, the SEC's implementing regulations provide that "the anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award."¹⁵

It is worth noting that the regulations governing attorneys cited by the ARB in *Jordan* would also apply to in-house attorneys bringing retaliation claims under Dodd-Frank.¹⁶ These regulations, enacted under the SEA, impose special requirements upon attorneys who represent the issuers of securities.¹⁷ Specifically, the regulations require an attorney to follow certain internal reporting procedures before reporting possible misconduct to the SEC.¹⁸ If such an attorney reasonably believes that the required internal reporting would be futile or

⁵ *Id.* at 995.

⁶ 2006-SOX-41 (ARB Sept. 30, 2009).

⁷ *Id.* at **14-15.

⁸ *Id.* at *15.

⁹ *Id.* at *17.

¹⁰ *Id.*

¹¹ The Dodd-Frank Act amended existing whistleblower protections under SOX and the False Claims Act and ushered in several new types of protection for whistleblowers. For example, section 922 of the Act amended the Securities Exchange Act to add new retaliation protections for whistleblowers and create new monetary incentives for whistleblowers who make qualifying reports of misconduct to the SEC. Section 748 of the Act amended the Commodity Exchange Act (CEA) to adopt similar provisions that both protect and incentivize whistleblowers. Protected activity under the CEA includes reports to the Commodity Futures Trading Commission (CFTC) or participation in investigations by that agency. Section 1057 of the Act prohibits retaliation against employees who report wrongdoing with regard to "consumer financial products or services," which is broadly defined under the Act.

¹² 17 C.F.R. § 240.21F-3.

¹³ *Id.* § 240.21F-2(b)(1).

¹⁴ 15 U.S.C. § 21F(h)(1).

¹⁵ 17 C.F.R. § 240.21F-2.

¹⁶ See *Jordan v. Spring Nextel Corp.*, 2006-SOX-41, at **14-15 (ARB Sept. 30, 2009).

¹⁷ 17 C.F.R. § 205.3.

¹⁸ *Id.*

the company does not respond appropriately to such a report, he or she “may reveal to the [SEC], without the issuer’s consent, confidential information related to the representation to the extent the attorney reasonably believes necessary to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;” to prevent the issuer from committing perjury in an SEC investigation or proceeding; or to rectify consequences of a material violation that “caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney’s services were used.”¹⁹

These regulations suggest that attorneys who do not pursue the proper internal reporting procedures, except where allowed under the regulations, may have committed professional misconduct that is relevant to any claim of retaliation. In other words, on the one hand, the regulations establish an appropriate procedure, based upon the particular obligations of an attorney to his or her client and client’s shareholders, for attorney whistleblowing. On the other hand, the ARB has read these requirements, in conjunction with whistleblower protections under SOX, as reason to allow in-house attorneys to bring claims of retaliation.²⁰

The False Claims Act

The False Claims Act (FCA) allows private citizens to file civil actions on behalf of the government—called *qui tam* actions—and provides such individuals a substantial portion of the government’s recovery.²¹ The FCA also affords retaliation protections to whistleblowers.²² There are cases, discussed further below, that address the extent to which in-house attorneys and compliance professionals can act as a *relator* (a private individual who brings a lawsuit on behalf of the government) and collect a portion of the government’s recovery in an action against the whistleblower’s employer. Courts have not, however, extensively addressed retaliatory discharge cases in this context. In one FCA case brought by an in-house attorney, the trial court dismissed a related state law wrongful discharge claim, finding that state case law and the Virginia Code of Professional Responsibility precluded a wrongful discharge claim of an in-house counsel, because it contravened the client’s absolute right to discharge its attorney.²³ On appeal, the Fourth Circuit affirmed the dismissal on different grounds, declining to reach the question of whether an in-house attorney could bring a wrongful discharge claim.²⁴ In yet another case, the court prohibited an in-house attorney from acting as a *qui tam* relator, but distinguished cases in which an attorney sues a former client in matters arising out of the counsel’s personal right or interest,²⁵ leaving open the question of whether such an attorney could state a claim of retaliation under the FCA.

Common Law Wrongful Discharge Claims

Retaliation claims brought by in-house attorneys have also arisen, with mixed results, in wrongful discharge or retaliation claims brought under various other state and federal laws. In the context of state common law retaliatory discharge claims, for example, the Illinois Supreme Court barred a claim by in-house counsel, finding that “in-house counsel generally are not entitled to bring a cause of action for retaliatory discharge against their employer/client.”²⁶ In that case, *Balla v. Gambro*, the court reasoned that the whistleblower protections were intended to encourage employees to come forward and report misconduct.²⁷ Where the employee is also counsel to the company, however, he or she already has an ethical obligation under ABA Model Rule of Professional Conduct 1.6 to disclose information necessary to prevent commission of a crime.²⁸ When it comes to attorneys, the court explained, they do not have a choice about reporting misconduct because they are ethically obligated under the state’s rules of professional conduct to do so.²⁹ According to the court, it is the attorney, not the employer, who should bear the costs of these ethical obligations.³⁰ In other words, the court reasoned, an employer should be free to terminate an attorney after the attorney makes allegations of misconduct, thereby straining the relationship, without being subject to liability in a retaliatory discharge lawsuit.³¹

19 *Id.*

20 *Jordan v. Spring Nextel Corp.*, 2006-SOX-41, at **14-15 (ARB Sept. 30, 2009).

21 31 U.S.C. § 3730(b).

22 *Id.* § 3730(h).

23 *Under Seal v. Under Seal*, 1994 U.S. App. LEXIS 5422, at **3-4 (4th Cir. Mar. 24, 1994).

24 *Id.*

25 *United States ex. rel. Fair Lab. Practices Assocs. v. Quest Diagnostics Inc.*, 2011 U.S. Dist. LEXIS 37014, at *29, n.15 (S.D.N.Y. Apr. 5, 2011).

26 *Balla v. Gambro, Inc.*, 145 Ill. 2d 492, 502 (1991).

27 *Id.* at 504.

28 *Id.*

29 *Id.* at 501.

30 *Id.* at 504.

31 *Id.* at 505.

The court in *Balla* also reasoned that extending the tort of retaliatory discharge to in-house counsel would have an undesirable chilling effect on attorney-client communications.³² As a result of this potential chilling effect, the court explained, employers would hesitate before seeking advice from their internal attorneys regarding potentially questionable corporate conduct, knowing that the attorney may use the information against them in a subsequent employment suit.³³

The court in *Balla* also rejected the plaintiff's assertion that he was acting in a non-legal regulatory compliance role when he reported his employer's alleged misconduct to the government.³⁴ Instead, the court found that the plaintiff was acting as general counsel throughout the situation at issue; that his role as general counsel was inextricably intertwined with the compliance function and that his conclusions regarding the company's conduct were legal in nature.³⁵

State and federal courts have not generally followed the *Balla* decision's approach of a complete, *per se* bar of retaliation claims by in-house counsel. Instead, courts have viewed these cases in relation to the state's rules of professional conduct, drawing a range of conclusions about what the rules mean for scope and prosecution of an in-house lawyer's whistleblower claim.

The Ethical Obligations of Attorney-Whistleblowers

Because courts have largely rejected the notion of a *per se* bar on retaliation claims by in-house attorney whistleblowers, they have had to grapple with the implications of attorneys' ethical obligations to maintain client confidences and their duties to former clients, determining what limitations those obligations impose on the scope of a claim and how it should be handled during litigation.

Rules Protecting Client Confidences

As the U.S. Supreme Court has explained, the attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law."³⁶ Its purpose is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."³⁷ Accordingly, all states have adopted ethical rules limiting an attorney's ability to reveal client confidences.

ABA Model Rule of Professional Conduct 1.6 permits disclosure of client information if the disclosure is necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." Furthermore, the ABA has issued a formal ethics opinion finding that a wrongful termination claim is a "claim" within the meaning of Model Rule 1.6.³⁸ Courts in states that have adopted the precise language of Model Rule 1.6 have held that, because of this exception, the ethical rule regarding disclosure of confidential information is not violated even if disclosure of client confidences is necessary to bring the whistleblower claim.³⁹ The vast majority of states have adopted this language.⁴⁰ It is important to note, however, that there is a distinction between the ethical rules and the substantive law regarding use of attorney-client and work-product privileged communications in litigation.⁴¹

32 *Id.* at 502-04.

33 *Id.*

34 *Id.* at 509-10.

35 *Id.*

36 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (internal citation omitted).

37 *Id.*

38 ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 01-424 (2001).

39 See *Douglas v. DynMcDermott Petroleum*, 144 F.3d 364 (5th Cir. 1998); *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173 (3rd Cir. 1997) (applying virtually identical rule, court rejected argument that Rule 1.6 limited disclosures of confidential information to fee disputes and situations involving attorney's defense of claim based upon examples in commentary; court rejected employer's argument that former in-house counsel's retaliatory discharge claim under Title VII should be dismissed; court noted that district court could enter protective orders, seal files, etc., that would permit plaintiff to "vindicate[] [her] rights while preserving core values underlying the attorney-client relationship"); see also *Willy v. Administrative Review Bd.*, 423 F.3d 483, 501 (5th Cir. 2005) (applying *Kachmar*, court held that "no rule or case law imposes a *per se* ban on the offensive use of documents subject to the attorney-client privilege in an in-house counsel's retaliatory discharge claim against his former employer under the federal whistleblower statutes when the action is before an [administrative law judge]"); *Van Asdale v. International Game, Tech.*, 498 F. Supp. 2d 1321, 1329 (D. Nev. 2007) (citing *Burkhart v. Semitool, Inc.*, 5 P.3d 1031 (Mont. 2000); holding that in-house counsel could proceed with SOX claim even if it required disclosure of privileged information because of the language of Nevada Rule 1.6, which is identical to the ABA Model Rule, and stating "[m]ultiple courts have found offensive use of privileged information appropriate under such rules"); *Hoffman v. Baltimore Police Dep't*, 379 F. Supp. 2d 778, 782-83 (D. Md. 2005); *Spratley v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603 (Utah 2003).

40 States that have adopted this precise language include: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Florida; Georgia; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Minnesota; Mississippi; Missouri; Montana; Nebraska; Nevada; New Hampshire; New Jersey; New Mexico; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Utah; Vermont; Virginia; Washington; West Virginia; Wisconsin; and Wyoming. Texas has adopted similar, but not identical, language. See TEX. DISCIPLINARY RULES OF PROF'L CONDUCT 1.05.

41 See *Nesselrotte v. Allegheny Energy, Inc.*, 2008 U.S. Dist. LEXIS 55730 (W.D. Pa. July 22, 2008).

A handful of states have adopted more restrictive ethical rules regarding the disclosure of client confidences. For example, the District of Columbia, Michigan, and New York expressly limit use of confidential information to claims involving a fee.⁴² In these states, the ethical rule regarding client confidences is violated if such confidences are disclosed by in-house counsel in the course of litigating a whistleblower claim, unless in-house counsel can show that some other exception applies, such as the crime-fraud exception.⁴³

California has adopted an even stricter rule of professional conduct regarding disclosure of client confidences. In particular, California attorneys are required:

“(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. [And] (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.”⁴⁴

As a result of this language, the California Supreme Court has held, “in those instances where the attorney-employee’s retaliatory discharge claim is incapable of complete resolution without breaching the attorney-client privilege, the suit may not proceed.”⁴⁵

In-house counsel may attempt to rely on the “crime-fraud” exception to the rules governing an attorney’s obligation to maintain client confidences. Under the crime-fraud exception, an attorney is permitted to make disclosures reasonably necessary to prevent an *ongoing* crime or fraud.⁴⁶ However, where the whistleblower does not have evidence the crime is ongoing, the exception does not apply.⁴⁷ Further, “in no procedural context may the bare, unilateral assertion that the crime-fraud exception applies justify disclosure.”⁴⁸ Instead, “[t]he party seeking disclosure of privileged material under the crime-fraud exception must first apply to the court with a factual basis sufficient to form a good faith belief that the exception would apply.”⁴⁹ Upon such a showing, a court will conduct an *in camera* review to determine whether the exception actually applies. Even after this determination, the disclosure cannot be made until all avenues of appeal are exhausted.⁵⁰

Finally, under many states’ rules, where in-house counsel becomes aware of a violation of the law that is likely to result in substantial injury to the company, he or she is permitted to reveal confidential information to the extent the lawyer reasonably believes necessary, after he or she has reported violations internally and the organization has failed to act.⁵¹

Duties to Former Clients

In addition to running afoul of the applicable rules regarding client confidentiality, pursuit by in-house counsel of some types of whistleblower claims, such as False Claim Acts suits, may violate the applicable rule of professional responsibility regarding duties to former clients. Many states have adopted rules prohibiting a lawyer who has formerly represented a client in a matter from representing “another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.”⁵² In *United States ex. rel. Fair Laboratory Practices Associates v. Quest Diagnostics Inc.*,⁵³ the U.S. District Court for the Southern District of New York dismissed a False Claims Act suit on the basis that the former in-house counsel, as relator, was “representing another person, the United States, in a matter substantially related and materially adverse to

42 See D.C. RULE OF PROF’L CONDUCT 1.6(e); MICH. RULE OF PROF’L CONDUCT 1.6(c); N.Y. RULE OF PROF’L CONDUCT 1.6(b).

43 See, e.g., *Wise v. Consolidated Edison Co.*, 723 N.Y.S.2d 462 (N.Y. App. Div.), *app. denied*, 756 N.E.2d 78 (N.Y. 2001).

44 CAL. BUS. & PROF. CODE § 6068(E).

45 *General Dynamics v. Superior Court*, 7 Cal. 4th 1164, 1170 (1994).

46 See, e.g., ABA MODEL RULES OF PROF’L CONDUCT R. 1.6.

47 See *United States ex. rel. Fair Lab. Practices Assocs. v. Quest Diagnostics Inc.*, 2011 U.S. Dist. LEXIS 37014, at **35-36 (S.D.N.Y. Apr. 5, 2011) (rejecting the plaintiff’s argument that his disclosure was permissible under the so-called “crime fraud” exception to rules preventing disclosure of privileged information and finding the crime-fraud exception to an attorney’s obligation to maintain client confidences to be limited to occasions in which the disclosure is necessary to prevent a client from committing a future crime or engaging in an ongoing criminal scheme.).

48 *Prudential Ins. Co. v. Massaro*, 2000 U.S. Dist. LEXIS 11985 (D.N.J. Aug. 14, 2000).

49 *Id.* at *29.

50 *Id.* at *30 (holding that former in-house counsel who in reliance on the crime-fraud exception disclosed privileged communications to attorneys adverse to the company, in an affidavit in open court, and in sworn statements to authorities investigating the company, acted in flagrant violation of his duties as an attorney because he deprived the company its “absolute right to be heard before a court of law in defense of its privilege” prior to the disclosure).

51 See, e.g., ABA MODEL RULE OF PROF’L CONDUCT R. 1.13.

52 See, e.g., ABA MODEL RULE OF PROF’L CONDUCT 1.9(a).

53 2011 U.S. Dist. LEXIS 37014 (S.D.N.Y. Apr. 5, 2011).

his former representation of [his employer] without his client's consent" and was therefore violating the rules of professional responsibility. However, where the attorney is suing in his or her personal capacity, this restriction does not apply.⁵⁴

Impact of Attorney Ethical Obligations

In light of the ethical rules described above, courts have placed various restrictions on whistleblower claims brought by in-house counsel. Some courts, for example, have allowed in-house attorneys to bring common law or statutory retaliation claims only to the extent that they can do so without breaching attorney-client privilege or revealing a client's confidential information.⁵⁵ In *General Dynamics Corporation v. Superior Court*, the California Supreme Court rejected the idea that in-house attorneys' remedy in cases where they feel compelled to blow the whistle is to withdraw from representation of their employer, calling such an option "illusory" and a "course fraught with the possibility of economic catastrophe and professional banishment."⁵⁶ The court acknowledged, however, that attorneys have a duty of fidelity to their clients' interests, which warrants certain limits on their capacity to bring wrongful discharge claims.⁵⁷ Further, the court concluded that, except in the rare instance where disclosure of client confidence is permitted under the Rules of Professional Conduct, attorneys should not be permitted to disclose client confidences.⁵⁸ Accordingly, "where the elements of a wrongful discharge in violation of a fundamental public policy claim cannot . . . be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege."⁵⁹ The court added that trial courts should employ equitable measures designed to allow in-house attorney-plaintiffs to offer the evidence necessary to prove their claims, without violating client confidences.⁶⁰ The measures suggested by the court include: sealing and protective orders; limited admissibility of evidence; restricting the use of testimony in successive proceedings; and *in camera* proceedings.⁶¹

The Massachusetts Supreme Judicial Court took a similar approach in *GTE Products Corporation v. Stewart*, limiting wrongful discharge claims by in-house counsel to those cases where: (1) the attorney would have violated ethical norms and duties imposed by statute or the Rules of Professional Conduct by complying with his or her employer's requests; and (2) the attorney-plaintiff can prove his or her claim without violating attorney obligations regarding client confidences.⁶² A California Court of Appeal took the *General Dynamics* decision one step further, allowing a former in-house attorney to disclose to her attorney "all facts relative to [her] termination, including employer confidences and privileged information," even if she could not ultimately submit that privileged information as evidence in support of her claim.⁶³

Other courts have taken an even more expansive approach, allowing claims by in-house counsel even where proving the claim would require disclosure of confidential information.⁶⁴ Courts have been particularly willing to allow both the claim and the disclosure of client confidences where the state had adopted the ABA's Model Rule 1.6.⁶⁵ For example, in *Burkhart v. Semitool*, the Montana Supreme Court relied on the state's Rule 1.6, which mirrors the model ABA rule, in determining that an in-house attorney can bring a retaliatory discharge claim and, moreover, can reveal client confidences, as necessary, to establish the claim.⁶⁶ The court rejected arguments that the rule should

54 *Coppola v. Proulx*, 2012 U.S. Dist. LEXIS 104792 (D. Nev. July 26, 2012) (holding that California's ethical prohibition regarding the subsequent representation of another against a former client did not apply to former in-house counsel's suit for violation of the Dodd-Frank Act's whistleblower protections because former in-house counsel was "suing only in his personal capacity for alleged injuries he personally suffered").

55 See, e.g., *GTE Prods. Corp. v. Stewart*, 421 Mass. 22, 29-32 (1995); *General Dynamics Corp. v. Superior Court*, 7 Cal. 4th 1164, 1186-92 (1994).

56 *General Dynamics Corp.*, 7 Cal. 4th at 1188.

57 *Id.* at 1189.

58 *Id.* at 1190.

59 *Id.*

60 *Id.* at 1191.

61 *Id.*

62 421 Mass 22, 30 (1995).

63 *Fox Searchlight Pictures, Inc. v. Pladino*, 106 Cal. Rptr. 2d 906 (Cal. Ct. App. 2001).

64 See, e.g., *Willy v. Administrative Review Bd.*, 423 F.3d 483, 500-01 (5th Cir. 2005); *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 181-82 (3d Cir. 1997); *Parker v. M & T Chemicals, Inc.*, 566 A.2d 215, 219-22 (N.J. Super. Ct. App. Div. 1989) (declining to determine what scope of confidential information may be allowed, but noting that the crime-fraud exception to the attorney-client privilege should be interpreted broadly).

65 See, e.g., *Heckman v. Zurich Holding Co. of Am.*, 242 F.R.D. 606, 609-11 (D. Kan. 2007); *Hoffman v. Baltimore Police Dep't*, 379 F. Supp. 2d 778, 782-83 (D. Md. 2005); *Spratley v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603 (Utah 2003).

66 5 P.3d 1031, 1040 (Mont. 2000).

be limited to those cases enumerated in the ABA's comments to the Model Rules, including malpractice claims and fee disputes.⁶⁷ Instead, the court concluded that the ABA intended to make the exception broad and that, under the rule, "a lawyer may reveal confidential attorney-client information, to the extent the lawyer reasonably believes necessary, to establish an employment-related claim against an employer who is also a client."⁶⁸

Other courts have followed this approach, allowing disclosure of confidential information to the extent necessary to prove an in-house lawyer's retaliatory discharge claim. In *Crews v. Buckman Labs International*, the Tennessee Supreme Court rejected the holdings of *General Dynamics* and *Stewart*, finding that the limitations upon use of confidential information "appear to stop just short of halting most of these actions at the courthouse door."⁶⁹ Indeed, the court adopted the same expansive interpretation of Model Rule 1.6, even though the state had not yet adopted the model rule, explaining that it could do so pursuant to its authority to regulate the practice of law.⁷⁰

One exception to this more expansive approach by states that have adopted Model Rule 1.6 arose in *Nesselrotte v. Allegheny Energy, Inc.*, where a federal district court in Pennsylvania rejected the argument that the rule could trump the attorney-client privilege in the context of an in-house attorney's lawsuit alleging retaliation under Title VII.⁷¹ In support of its decision, the court noted that the Rules of Professional Conduct "do not constitute substantive law."⁷² Although the court limited its opinion to the context of the case, in which the plaintiff removed confidential and privileged information from the workplace, it ordered that the plaintiff return confidential and privileged documents that she intended to use in support of her claim to the defendant.⁷³

Eligibility for Whistleblower Incentives

Although courts, legislators, and state bars have generally allowed in-house attorney-whistleblowers to sue their employers for unlawful retaliation, within certain constraints, courts have bristled at the notion of offering monetary incentives to in-house attorneys who report issues in their own company.

In-House Counsel as False Claims Act Qui Tam Relators

False Claims Act relators stand to receive a portion of the damages recovered in their lawsuit.⁷⁴ Although no provision of the FCA expressly precludes attorneys from acting as relators in a *qui tam* suit, serving as a relator in a suit against the in-house counsel's former client likely violates rules of professional conduct governing duties to former clients. In particular, as noted above, most states have adopted rules prohibiting a lawyer who has formerly represented a client in a matter from representing "another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."⁷⁵ In *United States ex. rel. Fair Laboratory Practices Associates v. Quest Diagnostics Inc.*,⁷⁶ the U. S. District Court for the Southern District of New York dismissed a False Claims Act suit on the basis that the former in-house counsel, as relator, was "representing another person, the United States, in a matter substantially related and materially adverse to his former representation of [his employer] without his client's consent" and was therefore violating the rules of professional responsibility. Similarly, in *United States ex rel. John Doe v. X Corp.*, a federal district court precluded a former in-house counsel from serving as a relator because the court found that the attorney could not ethically disclose the confidential information that supported his claim.⁷⁷ However, the court expressly held that "lawyers are not *per se* barred from serving as *qui tam* relators against former clients."⁷⁸ Further, "to the extent that state law permits a disclosure of client confidences, such as to prevent a future or ongoing crime or fraud, then the attorney's use of the *qui tam* mechanism to expose that

67 *Id.* at 1040-41.

68 *Id.* at 1041.

69 78 S.W.3d 852, 860 (Tenn. 2002).

70 *Id.* at 862-63.

71 *Nesselrotte v. Allegheny Energy, Inc.*, 2008 U.S. Dist. LEXIS 55730, at **36-39 (W.D. Pa. July 22, 2008).

72 *Id.* at *46.

73 *Id.* at *48.

74 31 U.S.C. § 3730(d).

75 *See, e.g.*, ABA MODEL RULES OF PROF'L CONDUCT R. 1.9(a).

76 2011 U.S. Dist. LEXIS 37014 (S.D.N.Y. Apr. 5, 2011).

77 862 F. Supp. 1502 (E.D. Va. 1994).

78 *Id.* at 1506.

fraud should be encouraged, not deterred.”⁷⁹ Accordingly, an in-house counsel seeking to serve as a *qui tam* relator and collect a portion of the government’s recovery may not be *per se* barred from doing so, but runs significant risk of running afoul of the applicable state rules of professional conduct.⁸⁰

In-House Counsel and Dodd-Frank Monetary Awards

Whether an in-house attorney may qualify for a monetary award under Dodd-Frank depends, to a large extent, on the applicable rules of professional conduct and whether the disclosure of the information is a violation of those rules.

To qualify for a monetary award under Dodd-Frank, a whistleblower must have “voluntarily” provided “original information” to the SEC that led to a successful enforcement action in which the SEC obtained monetary sanctions totaling more than one million dollars.⁸¹ On May 25, 2011, the SEC adopted final rules and regulations to implement the whistleblower provisions of section 922 of Dodd-Frank.⁸² Under the regulations, information obtained through an attorney-client privileged communication or in connection with the legal representation of a client does not qualify unless the disclosure would be otherwise permitted under, for example, “the applicable state attorney conduct rules” or the regulations governing attorneys practicing before the SEC.⁸³ In its commentary on the regulations, the SEC expressed its intention to send “a clear, important signal to attorneys, clients and others that there will be no prospect of financial benefit for submitting information in violation of an attorney’s ethical obligations.”⁸⁴ However, a disclosure that is required or allowed by state rules of professional conduct or by SEC regulation is not a contravention of the attorney’s ethical obligations and may, therefore, be grounds for recovery of a monetary award.

As discussed more fully above, the permissibility of disclosure of client confidences under the applicable bar rules varies depending on whether the state has adopted the ABA’s Model Rules of Professional Conduct, a variation on those rules, or something else entirely. Accordingly, this exception under the SEC regulations introduces significant variability in terms of which attorney disclosures may qualify for a monetary award. Nevertheless, the most common and universally accepted basis for a permissible disclosure of privileged information is the “crime-fraud” exception. Under the crime-fraud exception, as set forth in the ABA’s Model Rules, an attorney is permitted to make disclosures necessary to prevent ongoing crime or fraud.⁸⁵ In addition, in many states, in certain limited circumstances attorneys are permitted to reveal confidential information to the extent the attorney reasonably believes necessary, if he or she has already reported violations internally and the organization has failed to act.⁸⁶ If an attorney could prove that he or she was reporting externally in a manner consistent with one of these rules of professional conduct, he or she could potentially collect a significant monetary award from the SEC.

⁷⁹ *Id.* at 1507-08.

⁸⁰ Note that at least one court has held that a chief compliance officer of a company, who also holds a law license, may not have an attorney-client relationship with the company, depending upon the factual circumstances of the case. *United States ex. rel. Frazier v. IASIS Healthcare Corp.*, 2012 U.S. Dist. LEXIS 6896 (D. Ariz. Jan. 10, 2012). In that case, the chief compliance officer brought a *qui tam* suit against his former employer. The court found that even though the plaintiff was an attorney and the company paid his bar dues, there was no attorney-client relationship because he reported directly to the CEO, was not a member of the legal department, and told employees that their conversations with him were not privileged.

⁸¹ 17 C.F.R. § 240.21F-3.

⁸² In the context of whistleblower protections under the Commodity Exchange Act, the Commodity Futures Trading Commission (CFTC) has adopted similar provisions. The CFTC considers attorney-client privileged communications and information obtained as a result of legal representation of clients to be derived from “independent knowledge” (and therefore would allow an attorney to be a whistleblower) if the disclosure is permitted “by the applicable federal or state attorney conduct rules.” 17 C.F.R. § 165.2(g)(2)-(3).

⁸³ 17 C.F.R. § 240.21F-4(b)(4)(i) and (ii). The regulations also contain exclusions for the reporting of information obtained by: (1) “[a]n employee whose principal duties involve compliance or internal audit responsibilities” or an individual “employed by or otherwise associated with a firm retained to perform compliance or internal audit functions for an entity” (17 C.F.R. § 240.21F-4(b)(4)(iii)(B)); and (2) an individual “[e]mployed by or otherwise associated with a firm retained to conduct an inquiry or investigation into possible violations of law” (17 C.F.R. § 240.21F-4(b)(4)(iii)(C)).

⁸⁴ Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,299, 34,315 (June 13, 2011).

⁸⁵ See ABA MODEL RULES OF PROF’L CONDUCT R. 1.6.

⁸⁶ See, e.g., ABA MODEL RULES OF PROF’L CONDUCT R. 1.13 (“(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law. (c) Except as provided in paragraph (d), if (1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.”).

An in-house attorney may also be entitled to a monetary award under Dodd-Frank if the disclosure is allowed under the SEC's rules governing attorneys who practice before it on behalf of securities issuers.⁸⁷ These SEC rules outline the circumstances under which an attorney is permitted to disclose a client's confidential information and set forth certain mandatory internal reporting requirements for attorneys who become aware of material securities-related violations.⁸⁸

Any attorney subject to the SEC's rules of conduct who becomes aware of a material securities-related violation must report the violation to the company's chief legal officer, or to both the company's chief legal officer and chief executive officer.⁸⁹ The chief legal officer is then required to conduct an inquiry to determine whether a material violation has occurred, is ongoing, or is about to occur. If the chief legal officer fails to determine whether a material violation has occurred, is ongoing, or is about to occur, then he or she must take reasonable steps to cause the company to adopt an appropriate response.⁹⁰ If the attorney making the initial report does not reasonably believe that the chief legal officer or CEO has responded to the attorney's report appropriately, then the attorney is required to report the violation to: (1) the audit committee of the company's board of directors; (2) a committee of the board of directors comprised of individuals who are not employed by the company; or (3) the company's board of directors.⁹¹ If the attorney believes it would be futile to report the violation to the chief legal officer and CEO at the outset, the attorney can skip this requirement and proceed directly to reporting to any of the three groups listed above.⁹²

The regulations also allow an attorney to reveal to the SEC, without his client's consent, "confidential information related to the representation to the extent the attorney reasonably believes necessary" to: (1) prevent the company from committing a material violation that is likely to cause substantial injury to the financial interest or property of the company or its investors; (2) prevent the company from committing or suborning perjury or perpetrating a fraud on the SEC; or (3) remedy the consequences of a material violation that the attorney's services were used to further.⁹³ Therefore, an attorney whose disclosure fell within one of these categories could collect a bounty award on the basis of that disclosure.

Responding to a Claim: Protecting Confidential Information

Given the overwhelming trend toward allowing in-house attorneys to pursue retaliation claims against their employers, and even to collect monetary incentives for blowing the whistle, employers may find themselves searching for ways to mitigate the fallout from such claims. The potential for disclosure of privileged and confidential information is significant, requiring employers to diligently pursue and implement available protections against such disclosure.

*Agency Proceedings*⁹⁴

Agencies that investigate and adjudicate whistleblower claims are continuing to develop and refine rules and procedures for handling confidential and privileged information implicated by an in-house attorney's whistleblower claim. Generally speaking, an in-house attorney as a whistleblower may submit privileged information to an agency administering the whistleblower statute. Therefore, as the investigation and matter progress, the investigative team and counsel must be alert to the treatment of privileged information and be proactive in seeking its protection.

For example, OSHA specifically takes the position that attorney-claimants can file attorney-client privileged information and attorney work product "to the extent necessary to prove their claims."⁹⁵ Indeed, OSHA further states that an employer who refuses to produce documents on the basis that they are privileged does so at the risk of negative inferences about their contents.⁹⁶ OSHA will take steps

⁸⁷ See 17 C.F.R. § 240.21F-4(b)(4)(i).

⁸⁸ *Id.* § 205.3(b).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 17 C.F.R. § 205.3(b)(3).

⁹² *Id.* § 205.3(b)(4).

⁹³ *Id.* § 205.3(d)(2).

⁹⁴ This section primarily discusses adjudicatory procedures at OSHA. The SEC does not adjudicate whistleblower claims under the Securities and Exchange Act ("SEA"). However, regulations under the SEA do impose significant obligations upon corporate counsel with regard to both internal and external reports of misconduct. See, *supra*, p. 12, for a discussion of these obligations.

⁹⁵ See U.S. Department of Labor, OSHA Whistleblower Investigations Manual, at 1-21 (Sept. 20, 2011), available at <http://www.whistleblowers.gov>.

⁹⁶ *Id.*

to secure the privileged documents from unauthorized access and, to the extent allowable, will withhold such information from public disclosure in response to Freedom of Information Act (FOIA) requests.⁹⁷ In cases involving attorney-complainants, employers can request written assurance from OSHA that evidence will receive special treatment and be held in confidence to the extent permissible under the FOIA.⁹⁸

In addition, DOL regulations permit the issuance of protective orders upon the showing of good cause.⁹⁹ Specifically, with regard to privileged, classified, or sensitive information, the regulations permit an administrative law judge to issue a protective order or such other orders as in his or her judgment may be consistent with the objectives of: (1) protecting privileged communications; or (2) preventing undue disclosure of classified or sensitive matter.¹⁰⁰ The burden of establishing good cause rests with the person seeking the protective order. To establish “good cause,” the movant must explain and demonstrate “with specificity” why such a protective order should be granted.¹⁰¹

Court Proceedings

In addition to enacting Model Rule 1.6, which opened the door to disclosure of confidential information in wrongful discharge cases brought by in-house attorneys, the ABA also issued Formal Ethics Opinion 01-424, entitled “A Former In-House Lawyer May Pursue a Wrongful Discharge Claim Against Her Former Employer and Client As Long As Client Information Properly Is Protected.” The opinion describes a recent trend of courts allowing wrongful discharge claims by in-house counsel and explains that there is a basis for allowing such claims under the ABA Model Rules. The opinion adds that attorneys must, however, “limit disclosure of confidential client information to the extent reasonably possible.” Similarly, a comment to ABA Model Rule 1.6 makes clear that “a lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements limiting the risk of disclosure.” In addition to recommending use of *in camera* review and filing cases under seal, the ABA suggests it may be appropriate in certain cases for an action to go forward without identifying the parties’ names.

In those cases where courts have allowed claims that would require disclosure of client confidences, they have generally emphasized the role that trial courts can play in limiting and preventing unnecessary disclosure of those confidences. For example, the California Supreme Court¹⁰² and Montana Supreme Court¹⁰³ recommended using equitable measures, such as *in camera* proceedings and the use of sealing and protective orders. Similarly, the Third Circuit, in *Kachmar v. Sungard Data Systems, Inc.*, concluded that concerns regarding disclosure of client confidences could be adequately addressed through similar equitable measures.¹⁰⁴ The court acknowledged that “this may entail more attention by a judicial officer than in most other Title VII actions,” but added that it could not say “that the trial court, after assessing the sensitivity of the information offered at trial, would not be able to draft a procedure that permits vindicating [in-house counsel’s] rights while preserving the core values underlying the attorney-client relationship”¹⁰⁵

In implementing these equitable measures, many courts have issued protective orders that address disclosure of privileged or confidential information.

In *Nesselrotte v. Allegheny Energy, Inc.*, for example, the court issued a protective order directing the parties to produce all documents in their custody and control, regardless of any claim of privilege.¹⁰⁶ The court ordered the documents to be produced to the court, where said documents would be maintained for the course of the litigation and available for review by the parties by appointment. With regard to claims of privilege by the defendant, the court directed the defendant to prepare a privilege log after reviewing the documents and indicated that it would then make further rulings as needed, including possibly the appointment of a discovery special master to be paid for by the parties.

In *Heckman v. Zurich Holding Company of America*, the court granted a defendant-employer’s motion for protective order except as to the request that the parties be permitted to disclose confidential materials without waiving attorney-client privilege with regard to those

97 *Id.* (relying on FOIA exemption 4, which protects the public disclosure of trade secrets and commercial or financial information that is confidential or privileged); *see also* 5 U.S.C. § 552(b)(4).

98 *Id.*

99 29 C.F.R. §§ 18.15, 18.46.

100 *Id.* § 18.46.

101 *Id.* §§ 18.15, 18.46.

102 *General Dynamics Corp. v. Superior Court*, 7 Cal. 4th 1164, 1186-92 (Cal. 1994).

103 *Burkhart v. Semitool, Inc.*, 5 P.3d 1031 (Mont. 2000).

104 109 F.3d 173, 181-82 (3d Cir. 1997).

105 *Id.*

106 2008 U.S. Dist. LEXIS 55730, at **32-33 (W.D. Pa. July 22, 2008).

materials.¹⁰⁷ The court noted that, “generally, a voluntary disclosure of confidential information by a client waives any privilege which normally attaches to such material.”¹⁰⁸ The court further noted that the Tenth Circuit had previously refused to adopt a so-called “selective waiver” exception to this general rule, noting that such exception constitutes “a leap, not a natural, incremental next step in the common law development of privileges and protections.”¹⁰⁹

In *Hoffman v. Baltimore Police Department*, however, the court found the equitable measure proposed by the defendant—a motion to seal the entire record—to be overly broad and denied the motion.¹¹⁰ In denying the motion, the court noted that many of the plaintiff’s allegations were only tangentially related to attorney-client communications, while other allegations touched upon those communications only generally and “reveal[ed] only Plaintiff’s opinions and advice and not any confidential information provided to him to aid in the formation of those opinions or the rendering of that advice.”¹¹¹ Moreover, the court concluded that “[t]o the extent that Plaintiff’s advice to Defendants . . . fell within the attorney-client privilege,” that privilege was waived by defendants producing to the EEOC the same documents they did not want disclosed in the litigation.

Responding to a Claim: Pursuing a Remedy for In-House Attorney’s Violation of Ethical Obligations to the Company

If a current or former in-house counsel violates his or her ethical obligations in the course of pursuing a whistleblower claim, an employer has a number of avenues of relief available. Possible remedies include: seeking an injunction to prohibit the disclosure; seeking dismissal of the suit as a sanction for the breach; or reporting the ethical lapse to the applicable state bar disciplinary committee.

Injunctive Relief

An employer concerned about the disclosure of privileged information may seek an injunction to prevent the disclosure. In *X Corp. v. Doe (Doe I)*, an employer brought suit against its former in-house counsel and sought an injunction to prevent the in-house counsel from disclosing X Corp.’s confidential information and require the return of documents retained by the in-house counsel following his termination.¹¹² The in-house counsel asserted that the documents at issue revealed ongoing civil and criminal frauds perpetrated by X Corp. against the federal government and so fell within the crime-fraud exception to the attorney-client privilege.¹¹³ The court granted the employer’s request for preliminary injunction in part.¹¹⁴ The court noted that where attorney-client privileged communications are at risk of disclosure, irreparable harm is established.¹¹⁵ As the court explained, “[o]nce confidential attorney-client communications are disclosed, their confidential nature is permanently and irrevocably impaired. Even if X Corp. were ultimately to prevail, its right to prevent disclosures of confidential information might be forever lost absent a preliminary injunction.”¹¹⁶ However, the court denied the employer’s request to have the documents returned, explaining that there was not a threat of irreparable harm because the employer possessed the originals and the in-house counsel was being ordered not to disclose the confidential information.¹¹⁷ One year later, in *Doe II*,¹¹⁸ the court ordered the in-house counsel to return the disputed documents and granted the employer’s motion for summary judgment on the in-house counsel’s retaliatory discharge claim brought under the False Claims Act. As the court explained, to be entitled to disclose the documents under the then-applicable Virginia Code of Professional Responsibility, the in-house counsel was required to show that, “given knowledge of the disputed documents and information, a reasonable attorney in the same circumstances would find convincing evidence of the alleged fraud.”¹¹⁹ The court further explained that this standard “places an appropriately heavy burden on disclosing lawyers, as it balances the vital need to preserve the integrity of the attorney-client relationship against the need for disclosure in those rare circumstances where the relationship is abused.”¹²⁰

107 2007 U.S. Dist. LEXIS 34164 (D. Kan. May 8, 2007).

108 *Id.*

109 *Id.*

110 379 F. Supp. 2d 778, 782 (D. Md. 2005).

111 *Hoffman v. Baltimore Police Dep’t*, 379 F. Supp. 2d 778, 782 (D. Md. 2005).

112 805 F. Supp. 1298, 1300 (E.D. Va. 1992).

113 *Id.* at 1306-07.

114 *Id.* at 1311-12.

115 *Id.* at 1304, 1311.

116 *Id.* at 1304.

117 *Id.* at 1311.

118 *X Corp. v. Doe*, 816 F. Supp. 1086 (E.D. Va. 1993).

119 *Id.* at 1091.

120 *Id.* See also *Prudential Ins. Co. v. Massaro*, 2000 U.S. Dist. LEXIS 11985 (D.N.J. Aug. 14, 2000) (granting permanent injunction).

Dismissal as a Sanction

An employer also may seek dismissal of a lawsuit based on the violation of the rules of professional responsibility. In *United States ex rel. Fair Laboratory Practices Associates v. Quest Diagnostics Inc.*,¹²¹ the U. S. District Court for the Southern District of New York held that dismissal of the lawsuit and disqualification of counsel were the appropriate remedies given the violations of the legal code of ethics with respect to maintenance of client confidences and duties to former clients that were violated in pursuit of the litigation. The court specifically noted that the state ethical rules were not binding on federal courts, but where the federal statute does not preempt the state ethical rules the federal court balances the federal interests at stake. In *Quest Diagnostics*, the court balanced the interest of the federal government in encouraging *qui tam* actions under the FCA and the government's interest in preserving the attorney-client privilege. The court determined that the federal interest in protection of the attorney-client privilege was greater and dismissed the lawsuit. Similarly, in *Wise v. Consolidated Edison Company*,¹²² the appellate court ordered an in-house counsel's wrongful termination complaint dismissed because the case would require disclosure of the defendant's confidential information in violation of a state rule of professional conduct. The court explained:

[D]efendant's motion to dismiss the complaint should have been granted in its entirety, since permitting the action to go forward would entail the improper disclosure by plaintiff, an attorney who was in-house counsel to defendant prior to his termination, of client confidences The ethical obligation to maintain the "confidences" and "secrets" of clients and former clients is broader than the attorney-client privilege, and exists "without regard to the nature or source of information or the fact that others share the knowledge" Plaintiff's affirmative claims against defendant for damages, grounded in the theory of wrongful discharge, do not fall within the exception permitting an attorney to disclose confidences or secrets necessary to defend "against an accusation of wrongful conduct" . . . and plaintiff cannot circumvent the rule prohibiting such claims by reframing his claims as other related torts.¹²³

Reporting the Ethical Violation to the Appropriate Disciplinary Authority

An attorney who violates his or her ethical obligations in pursuing a whistleblower claim may face disciplinary proceedings. In *United States ex rel. Doe v. X. Corp.*, the U. S. District Court for the Eastern District of Virginia expressly held that the False Claims Act does not preempt applicable state law regarding the disclosure of client confidences, and, accordingly, "where an attorney's disclosure of client confidences is prohibited by state law in a given circumstance, that attorney risks subjecting himself to corresponding state disciplinary proceedings should he attempt to make the disclosure in a *qui tam* suit."¹²⁴ In fact, attorneys representing an employer may have an obligation to report the ethical violation to the appropriate state disciplinary authority.¹²⁵

Responding to a Claim: Employer Defenses

Several defenses may be raised in the event an in-house attorney as a whistleblower brings retaliation claims based on his or her whistleblowing activity. A whistleblower may raise a retaliation claim upon showing that he or she engaged in whistleblowing activity that is "protected activity," and that he or she suffered an adverse employment action that would not have been occurred absent the protected activity. During the course of the investigation, the investigation team should be aware of evidence that might support a defense to one or both of these elements.

121 2011 U.S. Dist. LEXIS 37014 (S.D.N.Y. Apr. 5, 2011).

122 723 N.Y.S.2d 462 (N.Y. App. Div.), app. denied, 756 N.E.2d 78 (N.Y. 2001).

123 *Wise*, 723 N.Y.S.2d at 463 (internal citations omitted); see also *GTE Prods. Corp. v. Stewart*, 421 Mass. 22, 29 (1995) (explaining, "a claim for wrongful discharge brought by in-house counsel will be recognized only in narrow and carefully delineated circumstances. To the extent that in-house counsel's claim depends on an assertion that compliance with the demands of the employer would have required the attorney to violate duties imposed by a statute or the disciplinary rules governing the practice of law . . . that claim will only be recognized if it depends on (1) explicit and unequivocal statutory or ethical norms (2) which embody policies of importance to the public at large in the circumstances of the particular case, and (3) the claim can be proved without any violation of the attorney's obligation to respect client confidences and secrets.") (citations omitted)); *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 376 (5th Cir. 1998) (reversing Title VII jury verdict in favor of in-house counsel and holding that "any betrayal of a client's confidences that breaches the ethical duties of the attorney places that conduct outside Title VII's protection.") (emphasis in original).

124 862 F. Supp. 1502, 1507 (E.D. Va. 1994).

125 See, e.g., ABA MODEL RULE PROF'L CONDUCT R. 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, **shall** inform the appropriate professional authority.") (emphasis added).

Protected Activity

Under SOX, an employee's opposition to an unlawful employment practice is protected if it is based on a "reasonable belief" that the practice actually is unlawful. This requires a showing that the employee had both a subjective and objectively reasonable belief that the complained-of conduct constituted a violation of one of the six enumerated categories of law.¹²⁶ An employee who does not actually believe that such conduct is illegal does not satisfy the subjective element of the test.¹²⁷ In evaluating the objective reasonableness of a belief, the DOL and courts will consider "the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved party."¹²⁸ In short, not every issue raised may rise to the level of protected activity. It is important to note, however, that the DOL's Administrative Review Board has recently reversed a line of decisions requiring that the allegation "definitively and specifically" relate to shareholder fraud.¹²⁹ At least in matters before the ARB, even vague and nonspecific allegations may be sufficient to establish a claim.

In an interesting federal district court case involving a SOX retaliation claim by in-house counsel, the court did not address whether the claim may be barred as a result of the plaintiff's role as counsel or the necessary disclosure of privileged information in litigation, but did find her role as in-house counsel directly relevant in concluding that she failed to establish that she engaged in protected activity under SOX.¹³⁰ The plaintiff alleged that two reports she made to the company's audit committee constituted protected activity. In one report, she alleged that the company may have violated securities regulations by failing to flag an executive's disclosure of material non-public information prior to the company going public. In determining whether the plaintiff engaged in protected activity, the court assessed whether she met her burden of showing that she possessed a subjective and objectively reasonable belief that the conduct she complained about actually constituted a securities violation. Although the plaintiff was not required to show that her report concerned an actual violation, the court did require her to show that a reasonable person in her position would have believed the allegation constituted illegal conduct. In this case the report concerned an allegation that the company had failed to make a required disclosure, which in fact was not a legal requirement because the company was not publicly traded at the time. In assessing the objective reasonableness of the plaintiff's belief, the court considered her role as an attorney to be relevant. For example, the court noted that the plaintiff had not researched the applicability of the regulation or directed members of her staff to do so, nor had she consulted outside securities counsel. The court rejected testimony from a securities expert that the plaintiff's misunderstanding was a reasonable one, noting that the testimony did not "negate the undisputed fact that [the plaintiff] had the resources available to her to help clarify this threshold question, but failed to utilize them."¹³¹

An employee is also considered not to have engaged in protected activity if he or she engaged in what is viewed as "unreasonable oppositional activity"—activity that is, for example, disruptive, disloyal or otherwise uncooperative.¹³² For in-house attorneys, distribution of confidential records in violation of professional duties of loyalty and confidentiality may constitute unreasonable oppositional activity.¹³³ For example, in one case involving a claim under a state whistleblowing statute, the court found the in-house attorney's claim to be barred, and the concurring opinion reasoned that the unauthorized distribution of privileged client information barred the whistleblower action

126 *Day v. Staples, Inc.*, 555 F.3d 42, 54 (1st Cir. 2009); *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Van Asdale v. International Game Tech.*, 577 F.3d 989, 1000-01 (9th Cir. 2009); *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1985 (2009); *Allen v. Administrative Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008).

127 See *Gale v. U.S. Dep't of Labor*, 2010 U.S. App. LEXIS 13104, at *10 (11th Cir. June 25, 2010) (unpublished) (affirming the ARB's decision that plaintiff lacked a subjective belief necessary to maintain a SOX claim because he "did not actually believe that [his employer's] activities were illegal or fraudulent").

128 *Allen*, 514 F.3d at 477; see also *Kalkunte v. DVI Fin. Servs., Inc.*, Nos. 05-139 & 05-140 (ARB Feb. 27, 2009) (former assistant general counsel engaged in protected activity when she reported to the board fraudulent disclosure practices and the CEO's attempt to interfere with investigation being conducted by outside counsel); *Harp*, 558 F.3d 722 (finding that laid-off auditing supervisor for a cable company failed to establish she had a reasonable belief that alleged overpayment to contractor constituted a fraud); *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352-56 (4th Cir. 2008) (finding that employee complaining about company's failure to comply with training requirements did not have a reasonable belief that securities laws had been or were being violated).

129 See *Sylvester v. Parexel Int'l L.L.C.*, No. 07-0123 (ARB May 25, 2011).

130 *Harkness v. C-Bass Diamond, L.L.C.*, 2010 U.S. Dist. LEXIS 24380 (D. Md. Mar. 16, 2010).

131 *Id.* at *17.

132 See *Rosser v. Laborers' Int'l Union of N. Am.*, Local No. 438, 616 F.2d 221, 223 (5th Cir. 1980) (analyzing opposition conduct in the context of Title VII); see also *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1446 (9th Cir. 1985) (same); see also *Gonzalez v. Bolger*, 486 F. Supp. 595, 602 (D.D.C. 1980) (same).

133 *United States ex rel. John Doe v. X Corp.*, 862 F. Supp. 1502 (E.D. Va. 1994) (in-house attorney effectively barred as a relator because he could not ethically disclose the confidential information that supported his claim).

and served as an independent basis for termination.¹³⁴ That said, it is important to note that there is disagreement about the extent to which an attorney's disclosure of confidential information constitutes protected activity. Recently, in *Vannoy v. Celanese Corporation*, the ARB held that the theft of confidential and proprietary data may in fact constitute protected activity.¹³⁵

An in-house attorney's whistleblowing activity may also not be protected activity if it can be fairly argued that the lawyer's conduct is consistent with his or her role within the company. Courts generally require the whistleblower to engage in conduct outside of his or her normal job duties to put the employer on notice of the potential claim. For example, courts handling FCA *qui tam* claims by individuals have held that conduct consistent with a plaintiff's regular job duties does not place the employer on notice of a potential FCA suit and, therefore, is not protected activity under the statute.¹³⁶ As the D.C. Circuit explained, "notice stemming from the performance of one's normal job responsibilities is typically inadequate . . . but when an employee acts outside his normal job responsibilities or alerts a party outside the usual chain of command, such action may be sufficient to notify the employer that the employee is engaged in protected activity."¹³⁷

In *DeCalonne v. G.I. Consultants*,¹³⁸ for example, the court found that the plaintiff provided sufficient evidence that he engaged in protected activity where he told the defendants he was concerned about the possibility of fraud and would cooperate in any government investigation, sought involvement of defendants' outside counsel, characterized defendants' conduct as illegal, and sought advice from an outside attorney. However, in *Maturi v. McLaughlin Research Corporation*, the First Circuit held that an employee whose job duties included oversight of government billing had not engaged in protected activity where he wrote a letter regarding a billing issue without characterizing it as fraudulent.

Courts have imposed this "stepping out of the role" requirement under numerous federal laws, including retaliation claims brought under Title VII,¹³⁹ the Uniformed Services Employment and Reemployment Rights Act,¹⁴⁰ and the Family and Medical Leave Act.¹⁴¹ It does not appear that this requirement has been addressed by courts in claims brought under Sarbanes-Oxley or the Dodd-Frank Act.¹⁴² However, at least one administrative law judge has rejected this requirement in a SOX claim brought by a former in-house attorney, explaining:

[Defendant's] assertion that [the plaintiff] must act outside her role as an in-house attorney in order to be protected under the Act is untenable as a matter of law. That requirement may apply in other contexts, but it is contrary to the case law and legislative history of SOX. I concur with the ALJ's holding in *Deremer v. Gulf Coast*, 2006-SOX-2 at 59-60 (ALJ June 29, 2007): "The Act contains no language excluding one's job duties from protected activity . . . It is quite conceivable, as in the case of Sherron Watkins of Enron, that one's job duties may broadly encompass reporting of illegal conduct, for which retaliation results. Therefore, restricting protected activity to place one's job duties beyond the reach of the Act would be contrary to Congressional intent."¹⁴³

134 *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 221, 233 (Minn. 2010) (J. Magnuson concurring) ("[W]hen a lawyer breaches his or her fiduciary duty to the client, the client has an absolute right to terminate the attorney-client relationship. And that right cannot be burdened by any claim from the lawyer for compensation or other damages.")

135 No. 09-1118 (ARB Sept. 28, 2011).

136 *United States ex rel. Schweizer v. Océ N.V.*, 677 F.3d 1228, 1239 (D.C. Cir. 2012); see also *Maturi v. McLaughlin Research Corp.*, 413 F.3d 166 (1st Cir. 2005) ("[W]here an employee's job duties involve investigating and reporting fraud, the employee's burden of proving he engaged in 'protected conduct' . . . is heightened."); *United States ex rel. Scott v. Metropolitan Health Corp.*, 375 F. Supp. 2d 626 (employee's FCA retaliation claim failed because her warnings to her employer were consistent with her job duties and did not give sufficient notice that she intended to pursue a FCA action); *United States ex rel. Bartlett v. Tyrone Hosp., Inc.*, 234 F.R.D. 113, 129 (W.D. Pa. 2006) (investigatory actions of non-compliance pursuant to one's duty as an employee do not constitute protected conduct . . . further notice that the investigation is for purposes of an FCA claim is required of the employee); *X Corp. v. Doe*, 816 F. Supp. 1086, 1096 (E.D. Va. 1993) ("[N]o retaliatory discharge is established if [in-house attorney's] discharge simply resulted from an adverse reaction to persistence in urging compliance.")

137 *United States ex rel. Brown v. Aramark Corp.*, 591 F. Supp. 2d 68, 77 (D.D.C. 2008).

138 197 F. Supp. 2d 1126 (N.D. Ind. 2002).

139 *DeSpain v. Evergreen Int'l Aviation, Inc.*, 2013 U.S. Dist. LEXIS 20617, at *7 (D. Or. Feb. 14, 2013) ("[I]f an employee's job responsibilities include providing legal advice and she acts within those job responsibilities, she is not protected from being terminated. However, if an employee's responsibility is to provide legal advice but she complains that she has personally been discriminated against or makes a personal complaint based on discrimination happening to someone else, she is protected from retaliation."); *Raney v. Paper & Chem. Supply Co.*, 2012 U.S. Dist. LEXIS 68392 (N.D. Ala. Apr. 24, 2012); *Cyrus v. Hyundai Motor Mfg. Ala., L.L.C.*, 2008 U.S. Dist. LEXIS 33826, at **38-39 (M.D. Ala. Apr. 24, 2008); *EEOC v. HBE Corp.*, 135 F.3d 543, 554 (8th Cir. 1998) (finding stepping out of role requirement satisfied where personnel director refused to implement policy he thought was discriminatory).

140 *Cook v. CTC Commc'ns Corp.*, 2007 U.S. Dist. LEXIS 132 (D.N.H. Oct. 30, 2007) ("Therefore, to show she engaged in protected activity, Cook must produce evidence that she acted outside her role as a human resources manager when she advocated on behalf of an employee's USERRA rights.")

141 *Id.*

142 *But see Ascare v. Mastercard Int'l, Inc.*, 2012 U.S. Dist. LEXIS 115427 (E.D. Mo. Aug. 16, 2012) (rejecting stepping out of the role requirement in whistleblower claim brought under Missouri common law by high level human resources official).

143 *Leznik v. Nektar Therapeutics, Inc.*, 2006-SOX-00093 (ARB Nov. 16, 2007).

Adverse Action

An employer may avoid liability for whistleblower retaliation if it can establish by “clear and convincing” evidence that it would have taken the same adverse employment action against the complainant absent his or her protected activity.¹⁴⁴ Although the precise meaning of “clear and convincing” remains unclear, the relevant cases underscore the importance of carefully documenting performance and disciplinary issues before taking any adverse action against an employee who may have engaged in protected activity.¹⁴⁵ Significantly, if in its response to an OSHA investigation for SOX the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action even if the complainant had not engaged in protected behavior, OSHA will not go forward with an investigation of the complaint even if the investigator had concluded that the complainant set forth a *prima facie* case.¹⁴⁶ Instead, the complaint will be dismissed.¹⁴⁷ The investigator’s decision to dismiss a complaint without completing an investigation or to proceed with an investigation is not subject to review by an ALJ.¹⁴⁸

After-Acquired Evidence

The doctrine of after-acquired evidence typically limits the damages that an employee may recover where an employer presents after-acquired evidence that would have justified the employee’s termination if the employer had known of the evidence at the time of discharge.¹⁴⁹ Whether the doctrine may be applied in SOX cases is unclear. At least one ALJ concluded that it was not applicable because SOX requires that an employer establish by clear and convincing evidence that it would have taken the same adverse action based on a legitimate, nondiscriminatory ground alone.¹⁵⁰ On the other hand, in *Van Asdale v. International Game Technologies*, the U.S. District Court for the District of Nevada noted that, although inapplicable in the specific case, the doctrine might have been applicable if the defendant had demonstrated by a preponderance of evidence that it would have fired one of the plaintiffs, who was its corporate counsel, for secretly recording conversations in violation of his ethical duties as a lawyer to his client.¹⁵¹

Responding to the Claim: Managing the Attorney-Whistleblower in the Workplace

Managing whistleblowers in the workplace can be tricky business. Managing in-house counsel as whistleblowers is particularly challenging. The in-house counsel is, on the one hand, a trusted advisor privy to the company’s most sensitive privileged information and legal positions. The in-house counsel is also, on the other hand, tasked with ethical and legal obligations to disclose certain behaviors. And, of course, there may be opportunistic in-house attorneys who simply seek financial gain. While an in-house counsel’s right to bring a whistleblower or related retaliation claim may vary from statute to statute and state to state, the internal approach to the in-house whistleblower should be the same generally speaking—that is, to conduct a prompt, thorough, and independent investigation and to make employment decisions as to the whistleblower that would have been made regardless of whistleblower status. This will underscore the company’s dedication to compliance, create and reinforce a culture of internal reporting, and may favorably impact the government’s position as to actions that it takes on the whistleblower claim.

144 49 U.S.C. § 42121; see also *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1376 (N.D. Ga. 2004) (employer entitled to summary judgment only if it could establish by clear and convincing evidence that it would have terminated plaintiff even if she had not engaged in protected activity); *Kalkunte v. DVI Fin. Servs., Inc.*, Nos. 05-139 & 05-140 (ARB Feb. 27, 2009) (although company offered nondiscriminatory reasons for discharging attorney, it failed to prove by clear and convincing evidence it would have discharged her at the same time had she not engaged in protected activity); *Reines v. Venture Bank & Venture Fin. Group*, 2005-SOX-112 (Dep’t of Labor Mar. 13, 2007) (dismissing the employee’s complaint where the employer established by clear and convincing evidence that it had sufficient nondiscriminatory reasons for its actions); *Platone v. FLYi, Inc. (formerly Atlantic Coast Airlines Holdings)*, No. 04-154, at *16 (ARB Sept. 29, 2006), *aff’d*, 548 F.3d 322 (4th Cir. 2008) (“If [the employee] succeeds in establishing that protected activity was a contributing factor, then the employer may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of her protected activity.”), *cert. denied*, 130 S. Ct. 622 (2009).

145 *Giurovici v. Equinix, Inc.*, No. 07-027 (ARB Sept. 30, 2008) (even if the claimant could show protected activity, the claim would have failed because of clear and convincing evidence he would have been fired anyway because of the well-documented record of poor performance and insubordination); see also *Hallowm v. Intel Corp.*, 2003-SOX-7 (Dep’t of Labor Mar. 3, 2004), *aff’d*, No. 04-068 (ARB Jan. 31, 2006) (retaliation claim dismissed because record clear that performance issues existed before the protected activity and the employee appeared to be “on his way out” prior to his complaints to the SEC); see also *Pardy v. Gray*, 2008 U.S. Dist. LEXIS 53997, at **17-18 (S.D.N.Y. July 15, 2008) (company established by clear and convincing evidence that it discharged employee for undisputed record of poor performance).

146 29 C.F.R. § 1980.104(c).

147 *Id.*

148 *Id.* § 1980.109(a).

149 See, e.g., *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352 (1995).

150 *Platone v. Atlantic Coast Airlines Holdings, Inc.*, 2003-SOX-27 (Dep’t of Labor July 13, 2004), *decision not adopted*, *Platone v. FLYi, Inc.*, 04-154 (ARB Sept. 29, 2006), *aff’d*, 548 F.3d 322 (4th Cir. 2008), *cert. denied*, 130 S. Ct. 622 (2009).

151 2009 U.S. Dist. LEXIS 114321, at **27-31 (D. Nev. Dec. 8, 2009).

Initial Response

Efforts to address a whistleblower's reported violation should start immediately. As the outset, he or she should be told that the investigation is being launched and that the allegations are being taken seriously. The Chief Legal Officer (CLO) and/or compliance officer (or their equivalents) should be told of the report if it was not made to them, and a determination should be made whether the audit committee or board or any other internal body should also be informed. The investigation team should be assembled with consideration given to the nature of the allegations and the extent to which individuals within the legal and compliance teams have factual knowledge and may be potential witnesses.

In circumstances involving in-house attorneys as whistleblowers, an independent third party may need to be hired to conduct the investigation. In many organizations, the legal department has responsibility for or involvement with conducting investigations. As a result, actual or perceived biases or conflicts may impede the investigation or lead to challenges that the investigation results are not reliable. Having an independent investigator at the outset will help the organization control how the events or decisions that are the basis of the complaint are disclosed externally and in a credible fashion.

The investigation team will identify witnesses, documents to be collected and preserved (in both physical and electronic form)—both for the investigation and any potential litigation that may ensue—and emphasize the importance of maintaining confidentiality to the degree feasible. The company and the investigation team should reinforce that retaliation is not permitted and be vigilant in ensuring that it does not occur. It is important to note at the outset that the definition of adverse action in the context of retaliation (whistleblower and otherwise) can be expansive, and can include disclosure of the whistleblower's name.¹⁵²

Many reasons exist for the prompt, thorough, and independent investigation of a whistleblower claim. As explained more fully above, SEC regulations require that an in-house attorney report allegations of wrongdoing internally. If, however, the reporting lawyer does not reasonably believe that the CLO (or CEO if applicable) has responded appropriately, he or she must then report to: (1) the audit committee; (2) a committee of the board of directors comprised of individuals who are not employed by the company; or (3) the company's board of directors.¹⁵³

Notably, the in-house attorney may proceed directly to any of these three groups if he or she reasonably believes it would be futile to report the violation to the CLO and CEO.¹⁵⁴ In addition, if an employee's principal duties involve compliance, he or she may qualify as a whistleblower under the SEC bounty program if the company does not complete its investigation and disclose the material violation to the SEC within 120 days of receiving notice of the possible violation.¹⁵⁵ The requisite company response identified in the mandatory disclosure rules for SEC lawyers provides helpful guidance as to the individuals who ought to be involved in the investigation and underscores the importance of conducting such an investigation in a prompt and thorough manner.

The Whistleblower's Lawyer

A whistleblower may have to retain a lawyer prior to reporting the alleged violation, or at some point during the investigative process. If so, the whistleblower may request that his or her lawyer be present during the investigation team's interview. Generally speaking, an employee does not have a right to have counsel or other representatives at internal investigatory interviews. However, denying the request in this context could have significant and negative ramifications when it comes to the quality of the investigation and the company's ability to defend adverse action claims that may arise as a result.

In *Welch v. Cardinal Bankshares Corporation*,¹⁵⁶ the CFO internally reported alleged financial improprieties. In response to the company's request to meet with him, the CFO stated that he would meet after consulting with his counsel; he then requested a copy of any policy that

¹⁵² See *Menendez v. Halliburton Inc.*, No. 09-002, at *24 (ARB Sept. 13, 2011) (finding that the employee suffered an adverse action when the company identified him as the source of an SEC inquiry to several company executives, his immediate superior, a number of company management officials, and his coworkers).

¹⁵³ 17 C.F.R. § 205.3(b)(3).

¹⁵⁴ *Id.* § 205.3(b)(4).

¹⁵⁵ *Id.* § 240.21F-4(b)(4)(v)(C). The SEC had originally proposed a 90-day period, but increased it to 120 days after receiving public comment as to the difficulty of investigating these complex issues. See Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,299, 34,315 (June 13, 2011); see also Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, available at www.sec.gov/rules/final/2011/34-64545.pdf.

¹⁵⁶ 2004 Extra LEXIS 56 (ALJ Jan. 28, 2004); see also *Welch v. Cardinal Bankshares Corp.*, No. 05-064 (ARB May 31, 2007) (ARB declined to adopt ALJ's ruling as to finding of retaliation on the basis that the complainant could not have had a reasonable belief that a violation occurred; but did not find error as to the ALJ's analysis and findings as to right to counsel, noting that inasmuch as the ALJ did not find that SOX provided an absolute right to counsel he did not err), *aff'd*, *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2009) (addressing only the ARB's decision as to no protected activity).

stated counsel could not be present at the meeting. The company refused to change the meeting date or times to accommodate the CFO's request to confer with counsel, and the CFO did not appear at the stated date and time. The company suspended and then terminated the CFO. In the DOL proceedings, the company stated that it fired the CFO for failing to attend the designated meeting. In refusing to permit the CFO's counsel to attend the interview, the company noted that the CFO did not have a right to have counsel present and expressed concern that the attorney's presence would impact attorney-client privilege.

The ALJ rejected the company's position, and found its termination reasons to be pretext for an unlawful termination in violation of the SOX anti-retaliation provisions. The ALJ was somewhat dismissive of the argument that there is no general right to an attorney at internal interviews and that failure to cooperate in an investigation is an independent basis for termination. Rather, the ALJ focused on the specific circumstances of the case and determined that the refusal to permit counsel in this case was intended to create a basis to justify termination.

With respect to the company's concern about divulging confidential information, the ALJ noted that the sole purpose of the interview was to elicit information from the CFO, not to impart information that was presently unknown to him. Nor did the ALJ see any legitimate risk that the information would be disclosed to others, given the fact that the CFO had a continuing obligation to maintain the confidentiality of the company's information and that his counsel would be under a similar obligation. With respect to the company's concern about attorney-client privilege, the ALJ cited *Upjohn Co. v. United States*¹⁵⁷ for the proposition that the CFO, given his fiduciary duty to the company, had the power to waive the attorney-client privilege on the company's behalf.¹⁵⁸

Welch is instructive, but of course does not address the unique issue of an in-house attorney as whistleblower where the content of the discussion may involve attorney-client privileged information. Notably, OSHA permits complainants to have an attorney or other personal representative present during their interview of the complainant limited only by the requirement that the investigator obtain a signed "designation of representative" form.¹⁵⁹

From a practical perspective, and as the ALJ in *Welch* noted, the purpose of the whistleblower interview is to elicit information—not to impart information or to seek legal advice. Proceed with caution before denying an in-house attorney whistleblower's request to have counsel present, or taking adverse action because the whistleblower refused to cooperate in the investigation absent his or her counsel's presence.

Preventing Retaliation

Illegal retaliation is an adverse action taken against an employee in reprisal for that person's engagement in protected activity.¹⁶⁰ The DOL considers a variety of actions to be adverse employment actions sufficient to support a claim under SOX, including discharge, demotion, suspension, reprimands, change in duties, threats, or harassment.¹⁶¹ In addition, the statute and regulations prohibit any other discrimination against an employee who has engaged in protected activity with respect "to the employee's compensation, terms, conditions, or privileges of employment."¹⁶²

When determining what constitutes an adverse action, some courts and ALJs in agency proceedings have applied a standard applied in the Title VII context by the U.S. Supreme Court in *Burlington Northern & Santa Fe Railway Company v. White*.¹⁶³ Under that standard an employee need only establish that the employer's action would have dissuaded a reasonable worker from engaging in the protected activity.¹⁶⁴ Even conduct that is not a concrete job action may qualify as an adverse action.¹⁶⁵ In *Menendez v. Halliburton, Inc.*, the ARB went beyond *Burlington Northern*, holding that any "non-trivial" employer action can constitute retaliation under SOX, regardless of whether it is employment-related.¹⁶⁶ Under *Menendez*, there is no requirement that the act be capable of dissuading a reasonable employee.

¹⁵⁷ 449 U.S. 383 (1981).

¹⁵⁸ *Welch v. Cardinal Bankshares Corp.*, No. 05-064, at **199-200.

¹⁵⁹ See U.S. Dep't of Labor, *OSHA Whistleblower Investigations Manual*, pp. 3-15, 3-16 (Sept. 20, 2011), available at <http://www.whistleblowers.gov>.

¹⁶⁰ *Id.* at 3-8.

¹⁶¹ *Id.* at 3-10, 3-11.

¹⁶² 29 C.F.R. § 1980.102(a).

¹⁶³ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); see also *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Allen v. Administrative Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008); *Miles v. Wal-Mart Stores, Inc.*, 2008 U.S. Dist. LEXIS 5781, at *10 & n.4 (W.D. Ark. Jan. 25, 2008); *Melton v. Yellow Trans., Inc.*, No. 06-052, at **10-11 (ARB Sept. 30, 2008); U.S. Dep't of Labor, *OSHA Whistleblower Investigations Manual*, p. 3-12, n.3 (Sept. 20, 2011), available at <http://www.whistleblowers.gov>.

¹⁶⁴ *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68.

¹⁶⁵ *Id.*

¹⁶⁶ *Menendez v. Halliburton, Inc.*, Nos. 09-002 & 09-003 (ARB Sept. 13, 2011) (finding that the employee suffered an adverse action when the company identified him as the source of an SEC inquiry to several company executives, his immediate superior, a number of company management officials, and his coworkers).

While it is critical that a whistleblower not be subjected to actions that could be construed as retaliatory, and that the company be diligent in enforcing and reinforcing this concept, the company is not prohibited from taking actions required or supported by a legitimate business justification. As noted earlier, an employer may avoid liability for whistleblower retaliation if it can establish that it would have taken the same adverse employment action against the complainant absent his or her protected activity.

For example, generally speaking an in-house attorney should be permitted to continue the performance of his or her job duties. However, a whistleblower's duties may be limited to the extent the whistleblower conduct was in demonstrable conflict with his or her duties as in-house counsel. For example, in *Jones v. Flagship Int'l*,¹⁶⁷ a Title VII retaliation case, the company's EEO manager filed an EEOC charge against the company. In addition, she took her supervisor's personnel file, solicited another employee to file an EEOC charge, and encouraged another employee to join in a legal action against the company. The company terminated her. Although the employee made out a *prima facie* case of retaliation, the court concluded that the termination was not retaliation because her specific conduct rendered her ineffective as the company's EEO manager—a position tasked with resolving employment issues through cooperation and conciliation.¹⁶⁸

Similarly, whistleblower status does not inoculate an in-house attorney or any other whistleblower from otherwise legitimate disciplinary actions related to job performance. For example, in *Halloum v. Intel Corporation*,¹⁶⁹ the ALJ dismissed an employee's claim because the company established that it had valid reasons for its adverse action. The employee in *Halloum* was placed in a corrective action program (CAP) to address poor performance. The employee complained to the human resources department that he was being harassed by his supervisor. In the course of the investigation into his complaints, the human resources department discovered that the employee had surreptitiously tape recorded conversations with subordinates and other coworkers. The human resources department concluded that there was no evidence of harassment. After it informed the employee of its finding, he began a medical leave of absence. During that time, he reported allegations of financial impropriety by his supervisor to the SEC and the CEO. When he returned to work, the employee received a revised CAP reflecting the earlier finding, lost certain responsibilities, and was warned against tape recording. The employee rejected the CAP and resigned. In dismissing his SOX claim, the ALJ noted that the employee appeared to be "on his way out" prior to his complaints to the SEC. Because the employee's poor performance and violation of company policy played a significant role in the employer's actions, the ALJ dismissed his whistleblowing claim.¹⁷⁰

In addressing the performance issues of a whistleblower, it is important to proceed with caution and in a manner consistent with the treatment of others for similar infractions or performance-related issues. Assess the degree to which the whistleblower is truly culpable for mistakes made (particularly as they relate to the subject of the alleged violation) versus being one of many whose actions contributed. Finally, be prepared to demonstrate the independent business justifications for the action and the appropriateness of the severity of the action with respect to the performance issue and as compared to disciplinary actions taken towards others.

The Cultural Impact

Allegations of impropriety from a legal or compliance officer can have a toxic effect and create a culture of crisis. The investigation into such allegations should be conducted as confidentially as possible and include only those necessary to the investigation process. Take the opportunity to reiterate the company's compliance policies, its commitment to compliance, and the internal mechanisms for reporting and independent investigation. Convey a culture that encourages (rather than discourages) internal reporting by demonstrating that the objective is to assess whether violations have occurred and to take appropriate measures if they have. Demonstrate by the company's actions (or inactions) that whistleblowers will not be treated with hostility or otherwise subject to adverse actions.

Severing the Relationship—Settlement and Release of Claims

When seeking to resolve a whistleblower case, employers are often concerned about the extent to which a release of claims or potential claims would be enforceable. At least one ALJ has suggested that SOX whistleblowing claims may be released. In *Moldauer v. Canandaigua*

¹⁶⁷ 793 F.2d 714 (5th Cir. 1986).

¹⁶⁸ *Id.* at 725-28; see also *Smith v. Singer*, 650 F.2d 214, 215 (9th Cir. 1982) (EEO officer's retaliation claim dismissed on summary judgment where he filed a complaint with the Defense Contract Administration Services alleging widespread discrimination in the company, denied knowledge when asked, and had actively assisted DCAS in its investigation and held secret meetings with minority employees to solicit additional complaints).

¹⁶⁹ 2003-SOX-7 (Dep't of Labor Mar. 3, 2004), *aff'd*, No. 04-068 (ARB Jan. 31, 2006).

¹⁷⁰ *Id.* See also *Giurovici v. Equinix, Inc.*, No. 07-027 (ARB Sept. 30, 2008) (even if the former site engineer could establish that he had engaged in protected activity, his claim would have failed because the company offered clear and convincing evidence it would have fired him anyway because of his well-documented record of poor performance and acts of insubordination); *Parry v. Gray*, 2008 U.S. Dist. LEXIS 53997, at **17-18 (S.D.N.Y. July 15, 2008) (company established by clear and convincing evidence that it discharged employee for undisputed record of poor performance).

Wine Company,¹⁷¹ an employee was terminated and signed a severance agreement with a release. He later filed an untimely whistleblowing charge and asked OSHA to toll the filing deadline, arguing that the employer had entered the severance agreement to prevent him from asserting his rights under SOX and that he and his attorney were unaware of SOX's whistleblowing protections at the time he signed the release. The ALJ rejected this argument, holding that "because he was represented, [the employee] is deemed to have had constructive notice of the Act's whistleblower complaint procedure."¹⁷² Although the ALJ did not rule on the issue directly, the *Moldauer* decision suggests that SOX whistleblower claims may properly be included in a release.

At the investigation stage, OSHA seeks settlement of all cases it deems meritorious before referring them for litigation and, before completing its investigation, it "will make every effort to accommodate an early resolution of complaints in which both parties seek it."¹⁷³ It is important to note, however, that an OSHA supervisor must review and approve the agreement "to ensure that the terms . . . are fair, adequate, reasonable, and consistent with the purpose and intent of the relevant whistleblower statute in the public interest."¹⁷⁴ Once OSHA approves an agreement, it becomes a final order of the Secretary of Labor and can be enforced in federal court. However, OSHA will deny a complainant's withdrawal if the parties have not submitted, or OSHA has otherwise not approved, a settlement agreement between the parties, and the agency will proceed to issue findings on the merits of the case.¹⁷⁵

As to the settlement agreement, OSHA will not approve any provision that "prohibits, restricts, or otherwise discourages an employee from participating in protected activity in the future."¹⁷⁶ Complainants may waive the right to recover future or additional benefits from actions that occurred prior to execution, but they may not waive the right to file a complaint either as to past or future actions.¹⁷⁷ Nor will OSHA approve a "gag" provision that restricts the complainant's ability to participate in investigations or testify as to matters that arose during his or her employment.¹⁷⁸

As to separation agreements generally, it may be wise to include in the employee's representations and warranties a statement to the effect that he or she is not aware of, or has already disclosed, any conduct that would be unlawful under SOX, Dodd-Frank, the FCA, or any other compliance obligation.

Policies and Procedures to Help Prevent Whistleblower Claims by Legal and Compliance Professionals

In addition to mounting a strong defense in response to any whistleblower claim by an in-house attorney, companies can also take certain measures to prevent hostile whistleblower situations from arising. Whistleblower situations involving a company's in-house attorneys and compliance professionals can be particularly difficult because it is the job of those employees to disclose any known or suspected misconduct. However, employers are sometimes unprepared to discuss these disclosures in a constructive manner and can make critical mistakes when communicating and working with professionals who have made them. When the communication system breaks down an in-house attorney or compliance professional may then become hostile and engage in harmful and disruptive conduct. Outlined below are several steps employers can take to prevent these types of communication failures and otherwise prevent in-house attorneys and compliance professionals from becoming hostile whistleblowers. Adopting policies and procedures designed to prevent a breakdown in communication can help keep these critical employees from becoming hostile whistleblowers in the first place.

As a starting point, employers should ensure that they meet the seven characteristics identified in the Federal Sentencing Guidelines as trademarks of effective compliance programs: (1) establishment of standards and procedures for preventing and detecting criminal conduct; (2) a board of directors that is knowledgeable about the compliance and ethics program and exercises reasonable oversight; (3) the absence of people in leadership positions who have engaged in illegal activities; (4) periodic communication of compliance-related standards and procedures, including training programs; (5) monitoring and auditing of the compliance program; (6) periodic evaluation of the program's effectiveness and a publicized system for anonymous reporting; and (7) reasonable incentives for employees who report misconduct and

¹⁷¹ 2003-SOX-26 (Dep't of Labor Nov. 14, 2003), *aff'd*, No. 04-022 (ARB Dec. 30, 2005) (J. Beyer, concurring).

¹⁷² *Id.*

¹⁷³ See U.S. Dep't of Labor, *OSHA Whistleblower Investigations Manual*, p. 6-1 (Sept. 20, 2011).

¹⁷⁴ *Id.* at 6-10.

¹⁷⁵ *Id.* at 6-11.

¹⁷⁶ *Id.* at 6-11.

¹⁷⁷ U.S. Dep't of Labor, *OSHA Whistleblower Investigations Manual*, p. 6-11.

¹⁷⁸ *Id.*

disciplinary action for employees who engage in misconduct. The following recommendations provide a more detailed analysis of these characteristics and describe further steps that employers can take to prevent and effectively handle hostile whistleblowing by compliance professionals.

Adopt Bounty Exclusion Language in Job Descriptions and Employment Contracts

Given the significant monetary incentives available to whistleblowers under the Dodd-Frank Act, employers should include language in employment contracts and job descriptions that tracks the language of the Dodd-Frank bounty exclusions, thereby preventing compliance professionals from being eligible for the bounty.

Under Dodd-Frank, bounties are only available for whistleblowers who “voluntarily” submit “original information to the SEC.”¹⁷⁹ According to the SEC, an individual who reports information to the SEC pursuant to some legal or contractual duty has not done so “voluntarily.”¹⁸⁰ In addition, “original information” is only that which is derived from a whistleblower’s independent knowledge and analysis and does not include information provided by an attorney “whose principal duties involve compliance or internal audit responsibilities.”¹⁸¹ Therefore, employers should strongly consider including in employment contracts affirmative language stating that it is the duty of attorneys and their staff to ensure that the organization is complying with applicable laws and regulations and to report actual or suspected misconduct according to the organization’s policies and procedures.

Work on the Culture of the Legal Department

In some cases, a skill that makes an attorney successful professionally does not correlate with an attorney being a great manager or motivator. According to one study, 15% of employees feel pressure to commit misconduct in weak ethical culture environments, whereas only 4% of employees feel pressure to commit misconduct in cultures with strong ethical cultures.¹⁸² Moreover, the incidence of misconduct reporting decreases by a third when employees believe that their employer has a weak ethical culture.¹⁸³ Legal departments are not immune from these tendencies. Legal departments should lean heavily on their human resources partners to gain an understanding of an ethical culture and then implement programs to improve employee engagement and productivity. Taking proactive steps to promote a healthy culture inside the legal department can help encourage professionals to make reports of suspected misconduct or retaliation internally, rather than relying upon exceptions in the rules of professional ethics that allow external reports and disclosures of client confidences.

Implement Effective Training Programs that Address Professional Ethics

Compliance and ethics training can assist an employer catch misconduct early, empower potential whistleblowers by giving them an alternative to government reporting, help foster an ethical culture, and assist in establishing legal defenses. Such training should be tailored to specific risks and populations. Accordingly, in-house attorneys and compliance professionals should receive specialized training regarding their duties to the client—*i.e.*, their employer—and their duties under their state’s rules of professional conduct, as well as the company’s policies and procedures relating to reporting misconduct.

Require Tailored Confidentiality Agreements

Confidentiality agreements with attorneys do not trump mandatory disclosure obligations. Such agreements, can, however, help to protect information by creating a contractual obligation that the attorney will be bound to follow. In other words, while an attorney may be permitted to make a disclosure according to professional guidelines, if he or she agrees to not disclose that information by contract, an employer will be in a stronger position to protect its confidential information and data.¹⁸⁴ Confidentiality agreements can also help to ensure that in-house attorneys do not disseminate this information more widely than necessary. Confidentiality agreements prohibiting, for

179 17 C.F.R. § 240.21F-2(a). In *Egan v. TradingScreen, Inc.*, 2011 U.S. Dist. LEXIS 47713, at **20-22 (S.D.N.Y. May 4, 2011), the plaintiff argued successfully that his internal complaint was sufficient to satisfy the requirement that he provide information to the SEC when his internal complaint led to the hiring of an outside law firm by the board of directors with the expectation that the law firm would eventually turn over its findings to the SEC, and the plaintiff was interviewed extensively by the law firm. The court held, however, that Dodd-Frank protection would not be available if the law firm did not in fact communicate the substance of the complaint to the SEC.

180 17 C.F.R. § 240.21F-4(a).

181 *Id.* § 240.21F-4(b)(4)(iii)(B).

182 Ethics Resource Center, *The Importance of Ethical Culture: Increasing Trust and Driving Down Risks*, 5 (2010), available at <http://www.ethics.org/files/u5/CultureSup4.pdf>.

183 *Id.*

184 As noted above, a court may not enforce the agreement depending on the controversy.

example, in-house attorneys from disclosing confidential information to the media, can help prevent public relations disasters and ensure against the leakage of important company information.¹⁸⁵ One court has recently held that such confidentiality agreements are permissible under Sarbanes-Oxley, and others are likely to follow suit in the future.¹⁸⁶

Ensure Communications with the Legal Department Are Marked “Attorney-Client Communication Privileged”

Most organizations today, including legal departments, struggle with the informal nature of many forms of communication, especially electronic communications like email and text messages. The Dodd-Frank bounty program underscores the need to require communications with in-house attorneys and their staff to be labeled as “attorney-client privileged” communications. Except in limited situations, a person is not eligible for a bounty if he or she obtained the information through a “communication that was subject to the attorney-client communication privilege.”¹⁸⁷ While it is always possible to prove—after a disclosure has been made—that it was privileged, a regulator may be more cautious if a person walks in and submits documents that are labeled “attorney-client privileged.” Organizations should therefore evaluate the various ways constituents in the organization communicate with the legal department and implement techniques and practices that will automatically mark communications as “attorney-client privileged.”

Restrict Access to Electronic Documents

Because the unauthorized removal of documents from an employer, including from its corporate computer system, can constitute protected activity under Sarbanes-Oxley,¹⁸⁸ employers should implement controls to limit access to electronic records, such as email correspondence. This limitation is particularly important given decisions rendering it lawful for an in-house attorney to bring a whistleblower claim based on information he learned through such communications, even privileged ones.¹⁸⁹ As a result, employers should implement procedures and internal controls that require dual approval to access certain types of information that might be needed in an audit or investigation, or in connection with litigation. It is a mistake to assume that in-house attorneys have the automatic authority to request any and all records at any point in time. For an employer to permit such unrestricted access is to dramatically increase its vulnerability to whistleblowing lawsuits and disclosure of confidential information.

Adopt Failsafe Reporting Requirements for Attorneys

Ultimately, employers hire attorneys into compliance roles to have a method for hitting an emergency stop button to prevent serious misconduct from occurring or continuing. A Code of Ethics or Conduct (“the Code”) should provide baseline standards that every employee, including in-house attorneys, must follow. Codes will vary considerably among industries, but most generally set forth: (1) the employer’s values and mission statements; (2) the purpose of the Code; (3) policies showing intent to abide by relevant laws and regulations applicable to the business; (4) policies addressing the employer’s other key risk areas, such as conflicts of interest; (5) reporting channels employees should use to report misconduct or seek guidance; and (6) a statement condemning retaliation of any kind for reports of misconduct.

In addition to broad statements in a Code, an employer should implement more specific reporting mechanisms for in-house counsel above and beyond attorney professional ethical obligations. These reporting mechanisms should be designed to ensure that in-house counsel reports instances of misconduct and Code violations up the chain of command. Like other employees, in-house attorneys should verify their understanding of the reporting policy via signed acknowledgments.

¹⁸⁵ Sue Reisinger, *Did a Former GE Attorney Leak Confidential Information?*, CORPORATE COUNSEL, Sept. 30, 2008, available at <http://www.law.com> (noting that General Electric sued a staff attorney for giving privileged tax documents to a reporter and government agencies).

¹⁸⁶ *Tides v. Boeing Co.*, 644 F.3d 809, 816 (9th Cir. May 3, 2011) (holding that Sarbanes-Oxley’s whistleblower provisions do not protect employees who leak confidential information to news outlets in violation of company policy).

¹⁸⁷ 17 C.F.R. § 240.21F-4(b)(4)(i).

¹⁸⁸ *Compare Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239, 269 (2010) (applying a balancing test to determine whether an employee can take employer documents), and *Vannoy v. Celanese Corp.*, No. 09-118, at *12 (ARB Sept. 28, 2011) (disclosure of confidential company information constituted protected activity), with *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 722-23 (6th Cir. 2008) (accessing, copying, and disseminating employer data did not constitute protected activity), and *O’Day v. McDonnell Douglas*, 79 F.3d 756, 74 (9th Cir. 1996) (copying sensitive information in violation of company policy did not constitute protected activity).

¹⁸⁹ See, e.g., *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 995 (9th Cir. 2009) (“confidentiality concerns alone do not warrant dismissal” of claims); *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 175, 181 (3d Cir. 1997) (reversing dismissal of an in-house counsel’s retaliation claim); *Jordan v. Sprint Nextel Corp.*, No. 06-104, at *1 (ARB Sept. 30, 2009) (holding that whistleblower could rely on privileged documents to support his Sarbanes-Oxley claim). But see 17 C.F.R. § 240.21 F-4(b)(4) (noting that under Dodd-Frank information obtained through communications subject to the attorney-client privilege is not the “independent knowledge” required to obtain a bounty).

The trigger event for the additional reporting requirement should be when a key manager or executive, after being made aware of a Code violation, refuses to comply with the Code. At that point, attorneys should be instructed that a specific report must be submitted so that the employer has the opportunity to take corrective action and stop the misconduct from occurring or continuing. This supplemental reporting procedure should be tailored to fit the employer's management structure and should include a failsafe reporting outlet directly to the employer's board of directors. Having this failsafe reporting requirement eliminates any ambiguity about roles and responsibilities and helps the employer defend against retaliation claims if the compliance professional did not comply with the policy. Any anonymous reporting hotlines or other avenues of reporting should be reserved for only those employees not in compliance-related roles. A compliance program would, after all, be a mere smokescreen if in-house attorneys could both make and investigate their own anonymous reports.

Investigate Reports of Misconduct Promptly

Every report of misconduct should be taken seriously, regardless of the reporter or the subject matter. According to Jack Welch, the former CEO of General Electric, "the only way to deal with a whistleblower's accusations—again, every single time and often against your own instincts—is with a hyper-bias toward believing that the informant is onto something big. Such a bias must impel you to investigate every claim ferociously."¹⁹⁰ It is also important to conduct the most thorough and effective investigation under the circumstances. In the context of in-house attorney-whistleblowers, this will often mean selecting an independent third party to conduct the investigation.

Reevaluate Hiring Procedures

Malcolm Forbes is quoted as saying, "It is all one to me if a man comes from Sing Sing Prison or Harvard. We hire a man, not his history." That is not true when it comes to hiring attorneys. As with many workplace disruptions or business failures, the root cause of a hostile whistleblower situation involving an in-house attorney may be a bad hiring decision. Employers need attorneys who will work to prevent and solve problems and not someone who will actively try to disrupt business. Because attorneys are entrusted with an employer's most sensitive information, the employer should focus on whether an attorney applicant will be able to uphold his or professional ethical obligations, abide by the company's policies and procedures, and only report externally as permitted by law.

Organizations hiring an attorney should be sure to conduct tailored background investigations and due diligence when determining which candidate is the most qualified for a particular role. Typical mistakes are made when: (1) a company only conducts criminal background checks in the counties where the attorney is currently living; (2) an attorney's litigation history is not reviewed; or (3) no check is made into whether any state bar grievances had been reported about the attorney. Taking these measures can help ensure that the attorney selected as a company's internal advisor has strong professional ethics.

Conclusion

The number of retaliation and whistleblower claims continues to rise sharply. This is fueled by at least five different engines, each of which alone could cause an uptick in claims: (1) a rapid expansion of legislative rights and remedies; (2) a concomitant judicial expansion of rights and remedies; (3) a precipitous increase in government enforcement by federal agencies like the SEC and OSHA; (4) a bevy of recent gigantic monetary awards to whistleblowers under bounty programs; and (5) a strong sense of public opinion swaying in favor of enhanced whistleblower protections. The fallout for companies—in terms of both court- or agency-ordered damages and reputational costs in the court of public opinion—remains significant.¹⁹¹

A company is left in a particularly vulnerable position when the very person who is entrusted with its confidences threatens to bring a retaliation or whistleblower claim. Despite the ethical complexities, this paper has identified the growing trend toward allowing in-house attorneys to pursue retaliation claims and collect bounty awards for blowing the whistle. Employers are not without recourse, however. If the appropriate steps are taken, a company may be able to restrict the confidential information that an in-house attorney discloses to the public and otherwise limit the damage to the organization. Furthermore, the best offense in this area is a strong defense and companies are urged to implement concrete changes to their compliance programs in order to be better positioned to detect and respond to allegations of wrongdoing before they become the subject of a government investigation or SOX complaint.

¹⁹⁰ Jack and Suzy Welch, *The Wal-Mart Mess: Everybody Does It (and we don't mean bribery)*, REUTERS, May 1, 2012.

¹⁹¹ See, e.g., Alexandra Wrage, *Microsoft Whistleblower Allegations Highlight Global Corruption Risks*, FORBES, Mar. 20, 2013; Christopher M. Matthews, Joe Palazzolo, and Shira Ovide, *U.S. Probes Microsoft Bribery Allegations*, WALL ST. J., Mar. 19, 2013.

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