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A Guide To Preventing False Claims Act Litigation

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Glenn Whitaker and Whitney Gibson, attorneys in the firm's Cincinnati office, co-authored a column entitled "A Guide To Preventing False Claims Act Litigation." The column was originally posted in the March 20, 2012 editions of *Government Contracts Law360* and *Employment Law360*.

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A Guide To Preventing False Claims Act Litigation

In 2010, the U.S. Department of Justice announced record-breaking recoveries under the False Claims Act (FCA). Given the significant increase in FCA litigation, employers are increasingly interested in identifying potential whistleblowers so that the organization can act proactively to prevent FCA lawsuits. But whistleblowers are not always easily identified by their personality traits.

Several studies have attempted to delineate the common characteristics of the whistleblower personality, with little success. Descriptions of the whistleblowers range from the "saints of secular culture"[1] to querulous paranoids.[2] More commonly, whistleblowers are described as individuals "driven by their sense of integrity and social responsibility to speak out" and "uninterested in tailoring their behavior to conform to particular situations." [3]

Given the array of whistleblower personalities, it is not surprising that the FCA claims asserted by these individuals also vary. There are, among others, FCA claims that involve actual fraud and wrongdoing, FCA claims that involve a difference of technical or professional opinion, and FCA claims initiated by malcontents with no basis whatsoever.

Given the variety of FCA lawsuits, the question then becomes, how can organizations possibly identify all the various potential whistleblowers and minimize exposure to FCA lawsuits? Based on our experience, the most effective way to address both of these issues is to encourage internal reporting of employee concerns.

Internal reporting allows employers to identify individuals within the organization who have knowledge of actual fraud, as well as those who simply have a difference of opinion. It also helps single out the malcontents and conspiracy theorists. As an added benefit, studies show that employees who report their concerns within the organization are less likely to file a lawsuit.[4]

There are several methods to encourage employees to report concerns internally, including:

- Establishing compliance programs to provide employees with an outlet to voice their disagreements.
- Appointing designated compliance officers — preferably senior personnel who have independence within the organization — to evaluate employee concerns.
- Establishing anonymous channels for reporting, such as hotlines or an ombudsman to help alleviate fear of retaliation and encourage candid communication.
- Regularly inquiring about any existing problems through annual questionnaires and exit interviews of departing employees.

Once a company has identified employees who may be potential whistleblowers through internal reporting, the organization can take affirmative action to minimize the risk of an FCA lawsuit.

First, the employer can ensure that no one in the organization retaliates against the potential whistleblower. Not only does the FCA prohibit retaliation, but retaliation is likely to incentivize an already disgruntled employee to proceed with an FCA lawsuit. Not surprisingly, studies have confirmed that threatened retaliation leads to more whistleblowing.[5]

Additionally, internal reporting allows the organization to evaluate the employee's complaint and tailor its response to the specific type of claim presented. For instance, if the complaint is legitimate and involves allegations of actual fraud, the company can take immediate action to correct any wrongdoing and ensure future compliance with regulatory or contractual requirements.

Similarly, if the complaint involves a difference of opinion, internal reporting of these concerns provides the employer with the opportunity to share the rationale behind the course of action adopted by the organization, and to explain why the company's actions do not constitute fraud.

In addition, the organization may consider notifying the government of the disagreement within the organization to demonstrate to both its employees and government officials that the company has no intent to defraud.

Finally, by encouraging internal reporting, organizations can minimize the risk posed by the malcontents and conspiracy theorists who may be looking for the opportunity to bring a lawsuit. These individuals are generally recognizable by the frequency, tone and persistence of their complaints.

Once these individuals have been identified, organizations can take action to limit their access to documents and information related to their job duties, so that the employee cannot use company resources to build an FCA case. In addition, the organization can train members of management to be both sensitive and careful in their interactions with the employee.

An anecdote from one of our recent cases illustrates how these principles work in practice. In this case, we were retained to defend a client in an FCA action filed by a former employee.

Initially, a member of management recognized that this employee commonly disagreed with his co-workers, and the manager established a liberal open-door policy and encouraged the employee to openly voice his concerns. The employee repeatedly approached the manager with his complaints and the manager promptly investigated the claims, and reported to the employee the results of the investigation and what corrective actions, if any, were taken. The employee did not file any lawsuits during this manager's tenure.

After some time, however, the manager with the open-door policy was replaced with a new manager who was less tolerant. The new manager became impatient with the employee's frequent complaints and he effectively shut down the open-door policy initiated by the prior manager. The disgruntled employee filed an FCA lawsuit against the company soon thereafter.

In short, while a singular psychological profile of the whistleblower personality remains elusive, and there are a plethora of recommended guidelines for creating FCA compliance programs, internal reporting remains the most effective method for identifying potential whistleblowers and reducing exposure to FCA lawsuits.

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[1] Colin Grant, Whistle Blowers: Saints of Secular Culture, *Journal of Business Ethics*, vol. 39, p. 391-399 (2002)

[2] Paul E. Mullen and Grant Lester, Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behavior, *Behavioral Sciences and the Law* 24: 333-349 (2006)

[3] Annette Greene, Jean Kantambu Lattig, Whistle-Blowing as a Form of Advocacy: Guidelines for the Practitioner and Organization, *Social Work*, Vol. 49 Issue 2, p. 219-230 (April 2004)

[4] Marcia Miceli and Janet Near, Characteristics of Organizational Climate and Perceived Wrongdoing Associated with Whistle-Blowing Decisions, *Personnel Psychology*, vol. 38 at p. 541 (1985)

[5] Marcia Miceli and Janet Near, Characteristics of Organizational Climate and Perceived Wrongdoing Associated with Whistle-Blowing Decisions, *Personnel Psychology*, vol. 38 at p. 538 (1985)