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Interview

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Whistleblower Litigation: Perspectives of a Management-Side Lawyer

In light of the increasing visibility of whistleblower cases, BNA asked Mr. Meindertsma for his perspectives in this important area.

BNA: As a starting point, it would be helpful to know what laws protect employees who “blow the whistle” on corporate wrongdoing.

Meindertsma: There are

more laws that afford protection to whistleblower employees than you might imagine. Certain federal laws were designed specifically to encourage and protect whistleblowing. Some are familiar: the False Claims Act empowers employees to bring fraud claims under that Act on behalf of the government and also contains a distinct whis-

tleblower protection provision. We've all heard about whistleblower claims under the Sarbanes-Oxley Act, of course. Then there are a host of lesser known federal whistleblower laws. Some of those laws are industry specific, and these include whistleblower protections that apply to the energy industry, the airlines, and trucking companies, to name a few. Another set of federal laws protects environmental whistleblowing. Although they are not typically considered whistleblower laws, many longstanding federal statutes include broad anti-retaliation

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provisions. Under federal labor law, for example, various forms of “blowing the whistle” could be considered protected concerted activity.

Then there are state laws. Many state legislatures have enacted whistleblower protection statutes over the years. Some of the state statutes do not apply to corporate entities because they protect only public employees. State courts also generally permit employees to bring wrongful discharge claims under the common law. The extent to which these common law causes of action protect whistleblowing varies significantly from state to state.

BNA: You refer to employees who “blow the whistle.” What types of employee activity counts as protected whistleblowing under the laws?

Meindertsma: The many different federal and state laws vary in terms of what conduct they protect. If we focus on federal laws, we can say as a general rule that an employee is protected only if the information he reports relates to a violation of federal law, and the employee reasonably believed there was a violation of the law. For example, under the federal aviation whistleblower law, a crew member, mechanic or airport employee who reports what he or she believes to be a violation of federal aviation regulations is engaged in protected whistleblowing. Under

the Sarbanes-Oxley Act, an employee who reasonably believes that his company is violating federal securities law is protected. Most federal whistleblower laws protect actions that go beyond reporting information; some protect employees who participate in investigations, and others protect employees who refuse to perform unsafe tasks. Ancillary activities may also qualify as protected conduct, such as taking photographs or surreptitiously tape recording workplace conversations.

BNA: Does an employee have to report the perceived violation of the law to a government agency to be protected as a whistleblower?

Meindertsma: Generally, no. So-called internal whistleblowing is typically protected. A number of the federal whistleblower laws provide lists of specific entities or individuals to whom a concern may be reported and considered protected. Many of our clients have been surprised to learn that an employee who reports alleged violations of the law to the media might be protected.

BNA: Does the federal government prosecute whistleblower claims on behalf of employees?

Meindertsma: Typically, the employee bears the responsibility to pursue a claim on his or her own behalf. Federal laws designate the proper forum, whether the U.S. Department of Labor or

federal court. Under other laws, the employee is not given a private right of action. In fact, the most common type of whistleblower allegation involves retaliation for reporting violations of OSHA regulations, but the OSH Act does not give employees the right to file a lawsuit against the employer for retaliation. Only the Department of Labor may do so by filing a complaint in federal court.

BNA: What remedies may an employee obtain in a whistleblower lawsuit?

Meindertsma: Whistleblower remedies are designed to make employees whole if they prove that they were retaliated against. Federal laws give employees the right to be reinstated to their jobs if they were discharged or demoted. Employees are also entitled to back pay and compensatory damages. A few of the federal laws permit awards of punitive damages, but that is uncommon. Most whistleblower protection laws also permit a successful plaintiff to recover the costs and attorneys fees expended on the case.

BNA: What factors distinguish whistleblower lawsuits from other employment discrimination claims?

Meindertsma: For regulated industries in particular whistleblower lawsuits pose unique risks. Under some federal schemes, not only may an employee bring a whistleblower lawsuit seeking reme-

dies, but the employer might be subject to civil penalties or other enforcement action if the employee proves retaliation. The FAA and Nuclear Regulatory Commission, for example, may pursue independent investigations of alleged whistleblower retaliation. Another important distinction is this: while a whistleblower case at bottom involves an *employment* claim, it will also involve an airing of the underlying alleged corporate misconduct that the employee reported. And, an employee who claims to be a “whistleblower” may be — by mere virtue of that label — viewed as a white knight fighting the evil corporate empire, at least where a jury is involved. Even settling a whistleblower case can be more complicated than settling a run-of-the-mill employment discrimination case because some laws require government approval of settlements or restrict the types of provisions that settlements may include.

BNA: How successful have employees been in pursuing whistleblower claims?

Meindertsma: Attorneys who represent plaintiffs in Sarbanes-Oxley whistleblower cases would tell you that the law is stacked in the company’s favor. It is true that employees have not been very successful in winning SOX claims. But expectations for what the SOX whistleblower protections would

accomplish were probably unrealistic. Like other post-Enron corporate reforms, the whistleblower provision was intended to help protect shareholders from fraud. Many SOX claims have been premised on more general allegations of corporate wrongdoing. The widely reported recent decision involving a Wyeth Pharmaceuticals manager is an example: the manager was concerned that Wyeth would not implement a training program within the timetable Wyeth committed to under the terms of a Consent Decree. The court ruled in Wyeth’s favor in part because the employee’s concern had nothing to do with fraud against shareholders.

On the other hand, employers likewise should not assume that the odds are in their favor in a given whistleblower case. An employee can prevail in a case based solely on circumstantial evidence. Many cases involve legitimate concerns by the employee about the company’s conduct and, at the same time, legitimate concerns by the employer about the employee’s performance or behavior. So mixed motive cases are not uncommon.

BNA: Are additional whistleblower protection laws being considered by Congress?

Meindertsma: The plaintiff’s bar has been relentless in its efforts to make whistleblower laws more employee-

friendly and to enact new laws altogether. An effort to amend the whistleblower provisions of the False Claims Act is ongoing. New whistleblower laws that apply to public transit agencies, railroads, and defense contractors were recently passed. Every now and then Congress considers omnibus whistleblower laws that would extend protections across the board to employees who report any type of safety, health, or fraud concern. A bill along those lines was introduced in the House just a few months ago.

BNA: Are there any significant legal issues playing out in the whistleblower arena?

Meindertsma: The interplay between federal and state whistleblower laws is raising important questions. In some jurisdictions, state courts do not permit an employee to bring a wrongful discharge claim if the employee has an adequate federal remedy. In those states, an employee who could file a complaint under, say, SOX, might be barred from bringing a state-law claim — which is what a Wisconsin court ruled last year. In other states, a federal whistleblower law might not be considered an “adequate” remedy if it does not provide for trial by jury or punitive damages. The interplay between a state’s statutory whistleblower protection and wrongful discharge claims also poses interesting ques-

tions. Many state courts in recent decades developed wrongful discharge claims and have been busy delineating the scope of those claims. Now, state legislatures are increasingly likely to pass their own whistleblower protections, with their own parameters. Whether a statute trumps the common law claim — or, on the other hand, whether an employee may pursue either or both statutory and common law claims — will have to be addressed by the states on a case by case basis.

Courts are still sorting out the ramifications for whistleblower claims of the Supreme Court's decision in *Burlington Northern v. White* a couple years back. The Court in that case attempted to define the concept of adverse employment action for Title VII retaliation claims, holding that trivial personnel actions are not grist for a case, but material employee actions are. Under some whistleblower statutes, the law has been that only "tangible" employment decisions — such as transfers and terminations — are actionable. How *Burlington Northern* affects whistleblower cases remains to be sorted out.

BNA: What actions can corporate counsel recommend to their management that might help minimize the risk of whistleblower claims?

Meindertsma: Publicly traded companies by now

have taken the basic steps, such as setting up hotlines that employees may use to report fraud and financial concerns, designating a corporate compliance officer, and coordinating with audit committees of their boards. But all companies, public or private, have a variety of additional options that can prove very effective in whistleblower claim avoidance. One effective exercise I recommend is to set up senior management roundtables, where an experienced professional meets with a senior management team to cover the legal risks that are pertinent to that company. Corporate counsel and senior human resources personnel should be included in the sessions. More generally, establishing a "culture of compliance" is an important step and requires strategic communications with the workforce. Training for supervisors and managers is another very effective tool: supervisors and managers should understand the types of activities that may count as protected whistleblowing, for example.