

# WHISTLEBLOWERS

**Labor and Employment Briefing**

**May 19, 2016**

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# OUTLINE OF WHISTLEBLOWER TOPICS

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- WHAT IS A PUBLIC EMPLOYEE WHISTLEBLOWER
  - Federal
    - ❖ Whistleblower Protection Act of 1989, Pub. L 101-12, 5 U.S.C. §1201 et seq. as amended by Whistleblower Protection Enhancement Act of 2012 (WEPA), Pub. L. 112-199:

Employee is protected for “any disclosure” he or she reasonably believes shows a violation of any law, rule, regulation; gross mismanagement or waste of funds; abuse of authority; or danger to public health or safety. 5 U.S.C. §2302(b)(8). WEPA clarified the protection extends to disclosure to a participant in the misconduct, information previously disclosed, regardless of the disclosing employee’s motive or whether disclosure was in the normal course of duty or while off duty, and regardless of lapse of time between the conduct and the disclosure. Remedies were added.

# OUTLINE OF WHISTLEBLOWER TOPICS

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- WHAT IS A PUBLIC EMPLOYEE WHISTLEBLOWER (cntd)

- State - Mississippi

Miss. Code §25-9-171:

Employee of state or local government is protected from adverse employment action when he or she provides information to a state investigative body. Remedies are both administrative action (employer board members liable for civil fine up to \$10,000 per violation) and civil action (back pay and reinstatement).

# OUTLINE OF WHISTLEBLOWER TOPICS

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- WHAT PROTECTIONS DO PRIVATE EMPLOYEE WHISTLEBLOWERS HAVE?
  - Common Law
    - ❖ Majority of states recognize public policy exception to common law doctrine of termination–at–will.
      - Retaliatory discharge cause of action is tort, usually carrying punitive damages.

# OUTLINE OF WHISTLEBLOWER TOPICS

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- WHAT PROTECTIONS DO PRIVATE EMPLOYEE WHISTLEBLOWERS HAVE? (cntd)
  - ❖ Mississippi case law, not by statute, recognizes a narrow public policy exception, whether or not there is a written employment contract.
    - McArn v. Allied Bruce–Terminix Company, Inc., 626 So.2d 603 (Miss. 1993): The exception covers “(1) an employee who refuses to participate in an illegal act” and “(2) an employee who is discharged for reporting illegal acts of his employer to the employer or anyone else.”

# OUTLINE OF WHISTLEBLOWER TOPICS

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- WHAT PROTECTIONS DO PRIVATE EMPLOYEES WHISTLEBLOWERS HAVE (cntd)
  - State Statutes
    - ❖ Mississippi does not have a specific statute other than for public employees.

# OUTLINE OF WHISTLEBLOWER TOPICS

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- WHAT PROTECTIONS DO PRIVATE EMPLOYEE WHISTLEBLOWERS HAVE (cntd)
  - Federal
    - ❖ False Claims Act (1986) – DOJ/quitam relators enforce
      - 31 U.S.C. §3730(h):

Employee discharged, demoted, suspended, threatened, harassed or discriminated against by employer because of lawful acts in furtherance of a [qui tam action], including investigation, initiation, testimony or assistance in such action shall be made whole. Relief includes reinstatement, twice the amount of back pay, interest, special damages, litigation costs, reasonable attorney's fees.

# OUTLINE OF WHISTLEBLOWER TOPICS

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- WHAT PROTECTIONS DO PRIVATE EMPLOYEE WHISTLEBLOWERS HAVE (cntd)
  - ❖ Sarbanes-Oxley(2002) – DOL/OSHA enforce
    - Section 922(b) allows informants retaliated against to sue employers in federal court within 6 years of act (or 3 years of its discovery).

# OUTLINE OF WHISTLEBLOWER TOPICS

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- WHAT PROTECTIONS DO PRIVATE EMPLOYEE WHISTLEBLOWERS HAVE (cntd)
  - Section 806 applies both domestically and overseas (O'Mahoney v. Accenture Ltd.) and to employees of publicly traded companies and their contractors and subcontractors, even if private entities. It prohibits retaliation for providing information on reasonable belief to authorities that the employer violated federal laws against shareholder fraud. Complaints must be filed within 180 days (originally 90 days) “of the violation”.

# OUTLINE OF WHISTLEBLOWER TOPICS

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- WHAT PROTECTIONS DO PRIVATE EMPLOYEE WHISTLEBLOWERS HAVE (cntd)
  - ❖ Consumer Financial Protection Act (Dodd Frank) (2010)
    - Section 1057, 12 U.S.C. §5567, protects employees in consumer financial services for reporting reasonably perceived violations of Dodd-Frank or matters subject to Consumer Financial Protection Bureau.
    - Section 748 provides for SEC/CFTC monetary awards for whistleblowers providing original information leading to successful enforcement action resulting in sanctions exceeding \$1 million.

# OUTLINE OF WHISTLEBLOWER TOPICS

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- ❖ SEC/CFTC (2011) – See below
- ❖ IRS – See below
- ❖ Industry specific statutes  
(list)

# OUTLINE OF WHISTLEBLOWER TOPICS

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- IN WHAT WAYS DO WHISTLEBLOWERS BLOW THE WHISTLE?
  - Internal
    - ❖ hotline
    - ❖ HR complaints
    - ❖ exit interviews
    - ❖ complaints to supervisors/co-workers

# OUTLINE OF WHISTLEBLOWER TOPICS

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- IN WHAT WAYS DO WHISTLEBLOWERS BLOW THE WHISTLE? (cntd)
  - External
    - ❖ complaints to competitors
    - ❖ complaints to regulatory/enforcement agencies
    - ❖ complaints to media
    - ❖ complaints (sealed) to courts

# OUTLINE OF WHISTLEBLOWER TOPICS

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- ISSUES WITH TIMING OF COMPLAINTS
  - Within company first
  - To regulatory/enforcement agencies first
  - Why it makes a difference
    - ❖ SEC rules provide incentives for whistleblowers who report internally.
    - Whistleblower receives credit when company provides information to SEC.
    - Whistleblower can then report to SEC within 120 days and be deemed to have done so on date of internal report so as to maintain place in line at SEC.

# OUTLINE OF WHISTLEBLOWER TOPICS

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- ISSUES WITH TIMING OF COMPLAINTS (cntd)
  - Internal reporting will be factor in amount of SEC award.

# OUTLINE OF WHISTLEBLOWER TOPICS

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- INCENTIVES FOR WHISTLEBLOWERS
  - FCA
    - ❖ If government intervenes and takes over the litigation, relator-whistleblower gets 15-25% of government recovery; if government does not intervene, relator-whistleblower can litigate and keep 25-30% of recovery.
  - SEC
    - ❖ Information leading to successful enforcement action with over \$1 million in sanctions earns whistleblower 10-30% of amount of sanctions.

# OUTLINE OF WHISTLEBLOWER TOPICS

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- INCENTIVES FOR WHISTLEBLOWERS (cntd)
  - CFTC
    - ❖ Same award procedure as for SEC. Largest award was \$10 million in March 2016.
  - IRS
    - ❖ IRS Code §7623(b):

Awards go to informant – whistleblowers who provide specific and credible information resulting in collection of taxes, penalties, interest.

# OUTLINE OF WHISTLEBLOWER TOPICS

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- INCENTIVES FOR WHISTLEBLOWERS (cntd)
  - ❖ Informant receives portion of tax proceeds collected based on tips, up to 15-30% if amounts in dispute exceed \$2 million or individual taxpayer's adjusted gross income exceeds \$200,000. Other awards for less at issue are non-reviewable. Only 99 awards made out of 72,000 claims in FY 2015.

# OUTLINE OF WHISTLEBLOWER TOPICS

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- ISSUES WITH INCENTIVES AND PROTECTION
  - FCA
    - ❖ Bars recovery by whistleblowers who are convicted of criminal conduct for their role in the fraud. U.S. ex rel. Carl Schroeder et al. v. CH2M Hill et al., Case No. 2:09-cv-0538(ED.WA)(relator dismissed from case)
    - ❖ Proof of original source of the information is required.
  - SEC
    - ❖ Independent evidence advancing the case is required. SEC Release No. 77751, In the Matter of JP Morgan Chase & Co. (April 29, 2016) (award denied)

# OUTLINE OF WHISTLEBLOWER TOPICS

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- ISSUES WITH INCENTIVES AND PROTECTION (cntd)
  - Ethics
    - ❖ U.S. ex rel. Holmes v. Northrop Grumman Corp. et al., Case No. 1:13-cv-00085(SD.MS), aff'd, Case No. 15-60514 (5<sup>th</sup> Cir. 2016)(in-house counsel breached privilege)
    - ❖ Double dipping by healthcare payment recapture auditors who can file qui tam actions
  - National Labor Relations Act – employee disloyalty as grounds for firing.
    - ❖ MikLin Enters., Inc. v. NLRB, No. 14-3099 (8<sup>th</sup> Cir., Mar. 25, 2016)

# OUTLINE OF WHISTLEBLOWER TOPICS

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- ISSUES WITH INCENTIVES AND PROTECTION (Cntd)
  - Posters on community bulletin boards in public areas complaining that sick employees were required to work did not justify disciplining and terminating employees.
  - Sarbanes-Oxley and Dodd-Frank
    - ❖ What does it mean to “voluntarily” provide information and what is “original” information?
    - ❖ Are there recognized excuses for missing filing deadline?

# OUTLINE OF WHISTLEBLOWER TOPICS

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- DEALING IN HOUSE WITH WHISTLEBLOWERS
  - Paraphrasing part of the physicians' Hippocratic oath: First Do No Harm = since you can't change the facts, don't make the solution/damage worse.
  - DOJ Deputy Attorney General Yates memo in September 2015 intensifies need to investigate, turning company into a form of whistleblower as to employees responsible for misconduct.

# OUTLINE OF WHISTLEBLOWER TOPICS

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- DEALING IN HOUSE WITH WHISTLEBLOWERS (cntd)
  - Two-front “War and Peace” Campaign
    - ❖ Investigate thoroughly
      - Sentencing Guidelines credit for compliance program and cooperation. U.S.S.G. §8B2.1:  
[D]iligence of organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization.  
Appropriate response includes self reporting and cooperation with authorities. Id. Comment 6; §8C2.5(g).

# OUTLINE OF WHISTLEBLOWER TOPICS

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- DEALING IN HOUSE WITH WHISTLEBLOWERS (cntd)
  - Qualify for non-prosecution or deferred prosecution agreement contingent on full cooperation and completeness of investigation.
  - Limit disclosure to employees, including the whistleblower.
    - Avoid waving attorney-client and work product privileges by making whistleblower a party to those communications or information.
    - If whistleblower makes unauthorized disclosure publicly or to government, make immediate assertion of privilege.

# OUTLINE OF WHISTLEBLOWER TOPICS

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- DEALING IN HOUSE WITH WHISTLEBLOWERS (cntd)
  - Clarify whether whistleblower was involved in the alleged wrongdoing.
  - Assess how whistleblower reporting affects company's self-disclosure option.
  - ❖ Avoid even the appearance of retaliation.
    - Have well publicized anti-retaliation policies in place and train employees on them.
    - Encourage anonymous reporting/"take a number".
    - Do not marginalize/isolate employee.

# OUTLINE OF WHISTLEBLOWER TOPICS

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- DEALING IN HOUSE WITH WHISTLEBLOWERS (cntd)
  - Discipline employee only for unrelated misconduct or poor performance under a written policy with treatment consistent with that for others.
  - Consider a lateral transfer with no effect on salary, location, benefits.

# OUTLINE OF WHISTLEBLOWER TOPICS

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- RECENT PROPOSED EXPANSION OF PROTECTIONS
  - Criminal Antitrust Anti-Retaliation Act of 2015, S.1599 (passed Senate, July 22, 2015)
    - ❖ Civil remedy for whistleblower retaliated against for reporting antitrust violation.
  - FBI Whistleblower Protection Enhancement Act of 2016, S.2390 (Hearings, 2016)
    - ❖ Improves protections for employee whistleblowers.