Top 10 Whistleblowing And Retaliation Events Of 2020

By **Steven Pearlman and Meika Freeman** (December 17, 2020)

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Year after year, we see substantial activity in the area of whistleblower retaliation law, an area that presents significant reputational and financial risks to employers of all sizes.

This last year had a unique twist as a result of the COVID-19 pandemic. In particular, the U.S. Department of Labor's Occupational Safety and Health Administration, or OSHA, has been inundated with thousands of whistleblower complaints related to alleged health and safety violations.

COVID-19 whistleblowers have also initiated litigation in federal and state courts, alleging they have been retaliated against for raising concerns related to the virus in violation of whistleblower protection statutes as well as common law.

Meanwhile, the U.S. Securities and Exchange Commission's Office of the Whistleblower reported a record-breaking year for its whistleblower program, and questions abound as to whether, and to what extent, the pandemic played a role.

In addition, courts have continued to issue noteworthy decisions under various whistleblower laws, such as the Sarbanes-Oxley Act, the Dodd-Frank Wall Street Reform and Consumer Protection Act, and the New Jersey Conscientious Employee Protection Act.

Here are the top 10 whistleblowing and retaliation events of the past year.

10. A Texas federal court dismissed a SOX whistleblower claim for lack of an employer-employee relationship, rejecting reliance on Lawson v. FMR.

On June 12, in Moody v. American National Insurance Co.,[1] the U.S. District Court for the Southern District of Texas granted a motion to dismiss a SOX whistleblower retaliation claim, finding that the complainant — who was a contractor and advisory board member of the defendant — was not an employee of the defendant, as required.

The plaintiff alleged he was retaliated against for complaining about the defendant's purported violations of SEC rules and bringing a related shareholder derivative suit.

The defendant moved to dismiss, arguing that the plaintiff was not an employee, and therefore, was not protected by SOX.

In arguing that he was covered by SOX, the plaintiff relied on the U.S. Supreme Court's 2014 decision in Lawson v. FMR LLC,[2] which ruled that SOX whistleblower protection extended to employees of contractors and subcontractors serving public companies.

The district court, however, explained that "retaliation plaintiffs must be employees of the defendant they sue, whether that defendant-employer is the public company itself or one of its contractors."

It was not enough that the plaintiff claimed to be the "functional equivalent of an employee" as an agent, contractor or subcontractor, nor that he was an advisory board member of the defendant.

This decision is valuable to employers because it limits the scope of individuals who may bring SOX actions by rejecting what it found to be an unreasonable interpretation of Lawson.

9. A New York federal court dismissed a Dodd-Frank retaliation claim for lack of protected activity and causation.

On Feb. 28, in Cellucci v. O'Leary,[3] the U.S. District Court for the Southern District of New York granted a motion to dismiss a former chief marketing officer's whistleblower retaliation claim under Dodd-Frank.

On March 7, 2019, a plaintiff alleged that he filed a complaint with the SEC concerning the defendant's CEO.

On March 27, 2019, the plaintiff filed a complaint alleging he was discharged shortly after filing his complaint for protected activity in violation of Dodd-Frank. Dismissing the claim, the court found that the plaintiff failed to plead that he engaged in protected activity and that his termination was causally connected to protected activity.

The court noted that the complaint contained no allegations as to the contents of the plaintiff's complaint to the SEC, and thus the court could not evaluate whether the alleged conduct even fell within the scope of Dodd-Frank or if the plaintiff held a reasonable belief that the conduct was unlawful.

Moreover, the plaintiff failed to allege that the defendant was aware of his complaint to the SEC.

This decision may be construed to heighten the pleading requirements under Dodd-Frank, effectively requiring plaintiffs to identify the content of their SEC complaints and allege that the employer was aware of the SEC complaint.

8. The Third Circuit held that temporal proximity alone is insufficient to establish causation under New Jersey's CEPA.

On Nov. 5, in Simoni v. Diamond,[4] the U.S. Court of Appeals for the Third Circuit affirmed a district court's decision granting the defendants' motion for summary judgment on the plaintiff's whistleblower retaliation claim under the New Jersey Conscientious Employee Protection Act.

The plaintiff worked as a nurse on a probationary period. After his first month, his first supervisor told him that he was not learning fast enough and did not take criticism well.

Later, a manager told the plaintiff that his second supervisor commented that his progress was slow and he grew defensive when receiving criticism.

The manager told the plaintiff not to discuss this with the second supervisor, but the plaintiff confronted the supervisor about it. Five days later, the plaintiff's employment was terminated because he allegedly took criticism poorly and disobeyed the manager's direct

order.

The plaintiff filed suit under CEPA, alleging the defendant fired him for complaining that his first supervisor failed to follow hospital safety codes.

The district court held that the plaintiff had not established a prima facie case under CEPA because there was no causal connection between his whistleblowing activity and the termination of his employment. The Third Circuit agreed, holding that the temporal proximity between the plaintiff's report and termination was insufficient to infer causation.

The plaintiff did not rebut the evidence that he was discharged for disobeying a direct order, and he did not offer evidence of causation beyond temporal proximity.

This decision enhances employers' ability to argue that a whistleblower's reliance on temporal proximity alone to establish causation may be insufficient to stave off summary judgment in CEPA actions.

7. California amended its whistleblower statute to permit recovery of attorney fees.

On Sept. 20, California Gov. Gavin Newsom signed A.B. 1947, which amended California's whistleblower protection statute, California Labor Code, Section 1102.5, to permit courts to award reasonable attorney fees to a plaintiff who brings a successful action pursuant to the statute.

California Labor Code, Section 1102.5 prohibits employers from making, adopting or enforcing any rule preventing an employee from disclosing information to a government or law enforcement agency, a supervisor or another employee with authority to investigate, or any public body conducting an investigation, if the employee has reasonable cause to believe the information discloses a violation of a law, rule or regulation.

Section 1102.5 also prohibits employers from retaliating against an employee for disclosing such information in those circumstances.

The new law will go into effect on Jan. 1, 2021. Given the incentive this amendment presents to plaintiffs attorneys, it would not be surprising to see an uptick in whistleblower retaliation claims under California Labor Code, Section 1102.5.

6. The Third Circuit confirmed limits on the scope of protected activity under SOX.

On July 16, in Reilly v. GlaxoSmithKline LLC,[5] the Third Circuit affirmed a district court's decision granting an employer's motion for summary judgment on a SOX whistleblower retaliation claim.

The plaintiff was a former information technology analyst. In 2011, he allegedly complained about security exposures and performance issues with servers. In 2013, the plaintiff also allegedly complained that certain users were being provided more authority than permitted by the servers' access management plan.

The plaintiff was placed in charge of resolving both issues. In 2014, the plaintiff escalated his complaints to the defendant's global compliance office, and in 2015, he allegedly complained to the CEO, adding that he believed the issues were not adequately disclosed in the defendant's report to the SEC.

The defendant conducted two internal investigations, which concluded the complaints were unfounded. In June 2015, the plaintiff's employment was terminated due to a department reorganization. On May 4, 2017, the plaintiff filed suit, alleging his employment was terminated in violation of the SOX whistleblower protection provision.

The U.S. District Court for the Eastern District of Pennsylvania granted the defendant summary judgment, ruling that the plaintiff had not established that his complaints related to any kind of fraud and no fact-finder could find his belief that defendant violated SOX to be objectively reasonable.

The Third Circuit affirmed, holding that the plaintiff failed to show that his belief that the defendant was committing fraud was objectively reasonable.

Specifically, the court held that it would not have been reasonable for the plaintiff to believe the defendant was perpetuating a fraud when it assigned him to remediate both issues about which he complained.

As to the plaintiff's allegation that the defendant shirked an obligation to disclose the issues in its SEC reports, the Third Circuit noted that, even assuming this was true, the plaintiff failed to explain how this constituted fraud that could form the basis of protected activity.

This decision provides noteworthy guidance given that whistleblower complaints relating to computer security issues have been on the rise.

5. A COVID-19 whistleblower protection bill was introduced in Congress.

On June 15, Sen. — now Vice President-elect — Kamala Harris, D-Calif., and Reps. Jackie Speier, D-Calif., and Jamie Raskin, D-Md., introduced the COVID-19 Whistleblower Protection Act, H.R. 7227. This bill seeks to establish whistleblower protections for employees who witness misuse of federal funds received through COVID-19 pandemic-related programs.

The bill prohibits employers from retaliating against individuals who disclose information concerning misuse of COVID-19 program funds, or who refuse to obey orders that they reasonably believe would violate the law with respect to any such funds.

The bill also provides that individuals may complain to the Department of Labor and, if the labor secretary does not issue a final decision within 180 days, bring an action in federal court. The bill is currently before the U.S. House of Representatives.

There's nothing new about whistleblower claims based on misuse of government funds. And, given the size of funds issued through pandemic-related programs, it would not be surprising to see related whistleblower litigation based on alleged misuse of funds received through such programs.

4. OSHA was inundated with COVID-19-related whistleblower complaints.

In the past year, OSHA has received thousands upon thousands of COVID-19-related whistleblower complaints alleging violations of the Occupational Safety and Health Act, and concerns have been raised about the agency's ability to effectively address all of them.

On Aug. 14, the DOL's Office of Inspector General audited the COVID-19 response by OSHA's whistleblower protection program, and released a report titled "COVID-19: OSHA Needs to Improve Its Handling of Whistleblower Complaints During the Pandemic."[6]

In sum, the OIG found "the pandemic has significantly increased the number of whistleblower complaints OSHA has received" and, particularly due to a decrease in the program's full time employment, "the potential exists for even greater delays."

The OIG made specific recommendations regarding staff vacancies, a triage process to expedite screening complaints, and a caseload management plan to equitably distribute complaints to investigators. OSHA agreed with the OIG's recommendations.

It remains to be seen whether such measures will enable OSHA to effectively tackle the deluge of COVID-19-related whistleblower complaints. In the meantime, it is possible that complainants who are frustrated by delays may turn to the courts.

3. COVID-19 whistleblower litigation is on the rise.

This year has seen a significant increase in whistleblower retaliation claims before courts around the country brought by employees who allege that they were retaliated against for reporting concerns related to COVID-19.

Plaintiffs are bringing claims under a variety of whistleblower protection statutes,[7] the National Labor Relations Act and common law alleging retaliatory discharge based on alleged violations of public policy — in the meantime, state and local ordinances prohibiting retaliation based on COVID-19-related concerns have proliferated.[8]

Such litigation is trending across numerous industries, including the health care and food service. This is illustrated by a recent example: On Aug. 24, in Berlingo v. Monroeville Rehabilitation Center,[9] the plaintiff filed suit in the Pennsylvania Court of Common Pleas alleging retaliation in violation of the Pennsylvania Whistleblower Law and wrongful termination in violation of Pennsylvania public policy.

The plaintiff was a nursing home administrator who alleges he was terminated for communicating with the state and local departments of health concerning COVID-19 infections at the defendant's long-term care facility. This lawsuit is emblematic of recent COVID-19 whistleblower retaliation lawsuits that are being filed across the country.

This trend requires employers to shore up their bases for adverse employment actions taken against COVID-19 whistleblowers and institute measures to minimize the risk of such claims, as discussed below.

2. The SEC issued its final rule amending whistleblower program rules.

On Sept. 23, the SEC announced its adoption of a much-anticipated final rule, passed by a vote of 3-2, which makes several noteworthy amendments to its whistleblower program.[10] The following are some of the key features of the rule:

First, the final rule clarified the award-setting procedures. When an award at the statutory maximum of 30% of monetary sanctions is $5 million or less, there will now be a presumption that the whistleblower will receive the maximum award so long as there are no factors present to reduce the award pursuant to Rule 21F-6(b).

While the final rule did not adopt a process for making downward adjustments of awards over $30 million, the SEC emphasized that it retains broad discretion to adjust awards under Rule 21F-6, and its evaluations of award amounts would consider the actual total dollar amount, as well as the relative percentage of the monetary sanction.

Second, the final rule expanded the types of successful enforcement actions that qualify a whistleblower for an award to include: deferred prosecution agreements, nonprosecution agreements, and settlement agreements outside the context of a judicial or administrative proceeding.

Third, the final rule defined the "independent analysis" requirement under Section 21F of the Securities Exchange Act. Section 21F limits awards to whistleblowers who provide original information derived from the whistleblower's independent knowledge or independent analysis. The final rule specified that the independent analysis requirement is satisfied where:

> 1) the whistleblower's conclusion of possible securities violations derives from multiple sources, including sources that, although publicly available, are not readily identified and accessed by a member of the public without specialized knowledge, unusual effort or substantial cost, and 2) these sources collectively raise a strong inference of a potential securities law violation that is not reasonably inferable by the Commission from any of the sources individually.

Fourth, the final rule implemented a multiple-recovery rule that prohibits whistleblowers who have been denied awards under other whistleblower programs from readjudicating issues before the SEC, and requires whistleblowers to waive their claims to awards under other programs prior to accepting an award from the SEC.

Fifth, the final rule revises the definition of whistleblower to comport with the U.S. Supreme Court's 2018 decision in Digital Realty Trust Inc. v. Somers,[11] defining a whistleblower as:

> i) an individual, ii) who provides the Commission with information 'in writing,' and iii) that relates to a possible violation of the federal securities laws (including any law, rule, or regulation subject to the jurisdiction of the Commission) that has occurred, is ongoing, or is about to occur.

The SEC had received many comments, and there is division on the issue of whether the final rule could effectively discourage whistleblowing. The final rule shows that the SEC continues to rigorously evaluate its whistleblower program as it matures.

1. The SEC whistleblower office had a record-breaking year, including issuance of a $114 million whistleblower award.

On Nov. 16, the SEC submitted its annual report to Congress on its whistleblower program,[12] which declared fiscal year 2020 to be record-breaking in a number of ways.

In fiscal year 2020, the SEC received over 6,900 whistleblower tips, the highest number of tips in any fiscal year. The SEC noted that the third quarter of fiscal year 2020 — April to June — resulted in a "particularly high number" of tips, which coincides with the beginning of the COVID-19 pandemic.

On Nov. 16, the Wall Street Journal Risk & Compliance Journal reported that Stephanie Avakian, director of the commission's division of enforcement, said: "There's probably been a fair amount of uptick in things to complain about in light of Covid," while also noting that the SEC cannot be sure what contributed to the increase, and there may be more than one reason for the rise in tips.

In addition, in fiscal year 2020, the SEC issued awards of approximately $175 million to 39 individuals, and both figures were the highest in any year of the whistleblower program. In fact, the SEC noted that the amount and number of whistleblower awards in 2020 accounted for approximately 37% of the total number of awards issued throughout the program's history.

On Oct. 22, the SEC announced an award of over $114 million issued to one whistleblower — the single-largest award issued in its history. And on June 4, the SEC announced an award of nearly $50 million to a whistleblower.

The foregoing shows that the SEC's whistleblower program is firing on all cylinders, as it is receiving a substantial number of tips and paying out huge sums of money.

Again, many wonder whether and how the pandemic influenced the program's results.

Looking Ahead

These events will continue to have significant implications in the foreseeable future.

The lawsuits filed by COVID-19 whistleblowers this year will continue to wind through the courts, and with the pandemic ongoing, many more COVID-19 whistleblower claims are expected to follow.

Likewise, OSHA will continue to grapple with the influx of whistleblower claims related to COVID-19, and it remains to be seen whether the agency's changes to its approach will be effective.

In addition, the SEC whistleblower program shows no sign of slowing down, as substantial awards continue to be issued amid the pandemic.

And, we can certainly expect to see the continuation of myriad forms of whistleblower retaliation lawsuits being filed under state and federal statutes and common law.

Thus, it would behoove employers to take concerted steps to modernize their compliance programs and ensure they are effective during the pandemic, revisit and strengthen their whistleblower protection policies and institute training for employees of all levels.

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as legal advice.

[1] No. 19-cv-00206 (S.D. Tex. June 12, 2020).

[2] 571 U.S. 429 (2014).

[3] No. 19-cv-02752 (S.D.N.Y. Feb. 28, 2020).

[4] No. 17-cv-2097 (3d Cir. Nov. 5, 2020).

[5] No. 19-cv-2897 (3d Cir. July 16, 2020).

[6] U.S. Department of Labor Office of Inspector General – Office of Audit, COVID-19: OSHA Needs to Improve Its Handling of Whistleblower Complaints During the Pandemic, Aug. 19, 2020, https://www.oversight.gov/sites/default/files/oig-reports/19-20-010-10-105_OSHA_WB_COVID-19_Final%20Rpt_081420.pdf.

[7] https://www.law360.com/articles/1274746.

[8] For example, on May 20, 2020, the city of Chicago passed a COVID-19 Anti-Retaliation Ordinance, which prohibits Chicago employers from retaliating against employees for obeying a public health order requiring an employee to remain at home due to the virus. And, on July 11, 2020, Colorado enacted the Public Health Emergency Whistleblower ("PHEW") Act, House Bill 20-4515. Among other items, the PHEW Act prohibits retaliation against an employee who raises reasonable concerns about workplace violations of government health and safety rules or a significant workplace threat to health or safety, related to a public health emergency; opposes any practice they reasonably believe to be a violation; or who testifies, assists, or participates in a proceeding about such a violation.

[9] GD-20-009050 (Pa. Ct. Com. Pl. Aug. 24, 2020).

[10] U.S. Securities and Exchange Commission, Final Rule, Sept. 23, 2020, https://www.sec.gov/rules/final/2020/34-89963.pdf.

[11] 138 S. Ct. 767 (2018).

[12] U.S. Securities and Exchange Commission, 2020 Annual Report to Congress Whistleblower Program, Nov. 16, 2020, https://www.sec.gov/files/2020%20Annual%20Report_0.pdf