When the Whistle Blows: A Framework for Companies to Recognize and Handle Whistleblower Allegations

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During my service in federal law enforcement, as both an F.B.I. agent and an Assistant U.S. Attorney, I handled allegations of wrongdoing made by myriad persons. I found that persons alleging wrongdoing tend to fit into one or more definable categories – for example, innocent bystanders who witnessed violent crimes, confidential informants, allegedly defrauded investors, angry ex-spouses, and business competitors.

The categories are not all-important, and investigators should not make too much of them. A person’s role with respect to the wrongdoing he/she alleges often is too complex to be reduced simply to one or more categories. Furthermore, in some ways all persons alleging wrongdoing, regardless of category, need to be treated similarly by investigators – for example, with due respect but with measured detachment.

In other ways, however, categorization matters. In certain respects, persons in some categories need to be treated differently from persons in other categories. For instance, confidential informants may have legitimate expectations, regarding confidentiality and remuneration, that others alleging wrongdoing do not possess. Similarly, unlike others alleging wrongdoing, defendants cooperating with the government often have, pursuant to a plea agreement, contractual rights and remedies that prosecutors must respect.

Persons alleging wrongdoing have particular attributes – rights, expectations, protections and remedies – associated with their respective categories. Officials – of private companies as well as government agencies – responsible for addressing such allegations ignore these attributes at their peril. To the extent that persons alleging wrongdoing fall into categories having particular characteristics, officials must recognize that fact and respond accordingly.

One such category is comprised of what are popularly known as “whistleblowers.” The term is used not only colloquially, but also in various state and federal statutes and judicial decisions. The term is being bandied about now like never before, due to, among other things, the high-profile new Dodd-Frank Wall Street Reform and Consumer Protection Act.¹

As a result of the increased attention, officials at private companies may ask themselves: (a) what exactly is a “whistleblower;” (b) why does it matter; and (c) what should a company do if it encounters a whistleblower? Below is a suggested framework for addressing these important issues: a suitable working definition of “whistleblower,” an explanation of the significance to companies of the fact that a particular person fits such definition, and finally a three-part protocol for handling situations
involving identified whistleblowers and their allegations.

Much has been written regarding how private companies can comprehensively handle allegations of company wrongdoing, whether made by a whistleblower or anyone else. That important topic – the ins and outs of internal investigations – is one for another occasion. Instead, the focus herein is on setting broad parameters for addressing the unique and challenging circumstances posed when allegations are made by whistleblowers.

‘Whistleblower’: A Definition for Companies

What is a “whistleblower?” The term is defined differently depending upon the party or law using it. The varying definitions are consistent in that a whistleblower is someone who reports alleged wrongdoing about an organization. Beyond that, however, the definitions diverge significantly. For example, some definitions include only employees of the organization, while others include anyone making the report. Some include only persons who report alleged wrongdoing to a law-enforcement or other government agency, while others also include persons who report internally within the organization. In short, “whistleblower” has no universally-recognized uniform definition; the definition used in a specific context is shaped by the particular perspective and objectives of the party or law using the term.

A private company’s definition should be shaped by its particular objective in using the term. As discussed further below, from the perspective of a private company, a “whistleblower” should be viewed as a person who makes allegations that may – although ultimately may not – require special handling due to legal protections and remedies possessed by the person. The company’s objective in labeling a particular person a “whistleblower” should be merely to signal that the company must determine whether in fact the person (and the allegations) require such special treatment and, if so, afford them the necessary special treatment. Dubbing someone a “whistleblower” serves to trigger this special response to that person’s allegations, to ensure that the company not subject itself to various remedies for violation of any legal protections possessed by that person.

Given the function of the term in this context, companies should define it broadly, without the limitations found in other contexts: a whistleblower is any person who makes a formal or informal report – to anyone – of violations of law or other wrongdoing occurring within the company. By using this broad definition, companies will wisely err on the side of checking to see whether the special response should be implemented, and thus avoid situations where it should have been implemented but was not.

So You Have a ‘Whistleblower’; So What?

A company may learn in various ways of a person who qualifies as a whistleblower thus defined – for instance, through the whistleblower’s internal reporting, the media, or a government enforcement agency. When a whistleblower comes to the company’s attention in whatever manner, the company’s antennae should go up. Specifically, as indicated above the company should institute a particular response, because whistleblowers require special attention and treatment by the company, to a greater or lesser degree depending on the circumstances.

The reason is straightforward and compelling: some whistleblowers are what may be called “protected” whistleblowers, meaning that they are entitled to certain protections, by virtue of one or more laws – statutes or common-law doctrines. A company needs to know whether the whistleblower is a protected whistleblower, in order to identify and honor protections to which the whistleblower is entitled, lest the company suffer the consequence of violating them.

Applicable laws generally provide protected whistleblowers one or both of two safeguards, namely, confidentiality and protection against
retaliation for making the allegations. The precise scope of these safeguards depends upon the whistleblower-protection law involved. The confidentiality measures required, and the kind of retaliation prohibited, varies from law to law.

When these safeguards exist, companies must respect them, lest they be subject to a variety of sanctions or remedies. For example, many statutes prohibit companies from retaliating against protected whistleblower-employees by firing or otherwise disciplining them, and authorize violations of the prohibition to be remedied via reinstatement, single or double back pay, and attorney’s fees and other litigation costs. Such retaliation can even be grounds for criminal prosecution. For example, it is a federal felony to interfere with a person’s employment in retaliation for providing a law-enforcement officer with truthful information regarding a federal crime. Given the stakes involved, a company needs to know when it is dealing with a protected whistleblower, in order to understand the specific resulting risks and respond accordingly.

In short, the fact that allegations are made by a “whistleblower” generally does not matter, unless the whistleblower is protected. Recognizing someone as a “whistleblower” generally serves a single but important function: alerting the company that it must determine whether the whistleblower is protected and thus requires special treatment.

Determining Whether the Whistleblower Is Protected: A Four-Part Test

It is easy to grasp the need to identify protected whistleblowers. Actually identifying them is more difficult, because laws providing such protection are contained in statutes spread throughout federal and state codes and in the common law of many states. Federal statutes affording whistleblower protection are numerous and applicable nationwide, but the law of a state having jurisdiction in a particular case also may contain an applicable statute or common-law doctrine. A company should have a plan for identifying any such laws that are applicable to any particular whistleblower who may arise.

A company first must understand the general prerequisites to whistleblower protection. The prerequisites can be articulated various ways, but the following four-part test is practical and comprehensible. First, the whistleblower must be within the whistleblower-protection law’s specified protected class of persons. The class could be very broad, even to the point of including any whistleblower. However, the class could be relatively narrow, for example including only company employees or persons working in a particular industry. Second, the whistleblower’s allegations must relate to the law’s specified subject matter, for instance, securities-fraud violations or violations of labor laws.

Third, the whistleblower’s reporting activity must be of the specified kind. In other words, the recipient, venue, and/or form of the allegations must be as specified in the law. For instance, a statute may protect a whistleblower if the allegations are reported to law enforcement officers but not if reported to others. Or a whistleblower may be protected as to testimony before Congress but not other institutions, or protected as to filing a lawsuit but not a police report.

What to Do When You Encounter a Whistleblower

A company therefore needs to respond attentively when it encounters a whistleblower. An appropriate response entails: (a) as indicated above, determining whether the whistleblower is protected; and, if so, (b) determining the extent to which the whistleblower’s protection limits the company’s options in responding to the whistleblower and his/her allegations; and (c) deliberately choosing from among the legitimate options existing within those limits.
Fourth, a whistleblower otherwise protected, based on satisfying these three criteria, must not be excluded from protection due to some special principle that excludes certain persons from the protected class. For example, courts may interpret a statute to deny protection to a whistleblower employee who had a specific job responsibility to report the wrongdoing.12

A whistleblower is protected only if these requirements all are satisfied with respect to one or more laws. Determining whether they are actually satisfied with respect to a particular statute may prove straightforward in some cases.

However, it may be more difficult to identify all statutes which should be subjected to the four-part test. Laws protecting whistleblowers cover a wide variety of circumstances, and may not even use the term “whistleblower.” How can a company be sure that there is not some law lurking somewhere that does provide protection under the particular circumstances involved, even though many others have been examined and found not to satisfy the four-part test?

Such assurance is promoted by two prudent measures. First, with the assistance of counsel, company officials can compile, and become familiar with, a list of whistleblower protection laws that are most likely to apply to whistleblowers it encounters. The content of the list will depend upon various factors, including the company’s industry and size. Second, upon learning of specific whistleblower allegations, company officials can ask counsel to identify other laws potentially applicable under the particular circumstances. 

So You Have a Protected Whistleblower: Now Sequentially Determine Your Lawful Options

In particular cases, the four-part test will reveal that allegations of company wrongdoing have indeed come from a whistleblower protected by one or more laws. This signals the company that it must proceed cautiously in dealing with the whistleblower, lest it violate applicable protection. The protection may limit the company’s options in dealing with both the whistleblower and the allegations. It may inhibit not only certain actions directly vis-à-vis the whistleblower, such as discipline, but also certain investigatory actions, such as interviews of the whistleblower that could be deemed “harassment.” Thus, the company should determine the extent to which the whistleblower’s protection includes protection against actions the company conceivably could take regarding the whistleblower or the allegations. Only then can the company make informed decisions about how to proceed.

Whistleblower protection is not absolute. Whistleblower protection laws do not protect whistleblowers from everything and everybody, but rather generally only from particular actions taken for particular reasons. For example, a typical whistleblower-protection statute will provide a whistleblower protection only against: (a) an employer’s retaliatory actions; (b) taken because of the whistleblower’s activities in reporting the alleged wrongdoing; and, in some cases, (c) breach of confidentiality of reporting.

For example, Section 806(a) of the Sarbanes-Oxley Act prohibits: (a) a publicly-traded company’s discharge, demotion, suspension, threats, harassment, or any other manner of discrimination against its employee in the terms and conditions of employment; and (b) because of any lawful act done by the employee to provide information, or initiate or participate in proceedings, related to certain alleged violations of SEC rules or federal laws against securities or other fraud.13 Thus, it does not prohibit an employer doing anything that does not constitute employment discrimination, such as non-threatening and non-harassing attempts to interview the employee. Nor does it prohibit employer’s actions taken not because of the employee’s specified lawful provision of information or participation in proceedings. For example, it does not prohibit discharge or milder discipline imposed because of employee actions that were either unlawful or not done to provide
information or participate in proceedings. The statute does not prohibit discipline based upon, for instance, the employee’s outright theft of documents later used by the whistleblower to support the allegations – an action which is obviously not lawful and arguably not done to provide information or initiate or participate in proceedings per se.

Importantly, a whistleblower acts at his/her peril when he/she “confuses protecting whistleblowers from retaliation for lawfully reporting fraud with immunizing whistleblowers for wrongful acts made in the course of looking for evidence of fraud.”

Protection may exist for lawful reporting activity, but should not extend to wrongful muckraking activity.

That is not to say that the company necessarily should in fact go ahead with the hypothetical attempts to interview or discipline such employee. If it does, it may someday have to justify such actions in litigation addressing whether its attempts to interview actually constituted threats or harassment and why in fact it disciplined the employee. Moreover, other whistleblower-protection statutes may prohibit such steps by the employer even if Section 806(a) does not. Nevertheless, a company would be well-served to undertake an analysis, with respect to every whistleblower-protection law that may be applicable, as to what steps it may take vis-à-vis the whistleblower without violating the law. Prudent companies will undertake such analysis with the advice of counsel qualified to parse and interpret the pertinent legal authority.

Companies thereby can identify lawful options for dealing with the whistleblower and the allegations. Depending on the circumstances, there may be numerous “negative” – from the whistleblower’s perspective – procedural or substantive options. Negative procedural options may include seeking to interview the employee and conducting an inquiry into the whistleblower’s actual motivation for making the allegations. Negative substantive options include terminating or otherwise disciplining the employee for troubling conduct that is unlawful and/or unrelated to protected reporting activity per se. Of course, whistleblower protection would in no way restrict the company from choosing any “positive” procedural or substantive options – such as leaving the whistleblower alone or rewarding him/her for bringing important problems to the company’s attention.

The company should not necessarily identify lawful options all at once. A determination as to whether a particular option is legitimate should not be made prematurely, before sufficient information has been gathered to enable an informed determination. Such determinations generally should be made sequentially, not all at once. Earlier determinations can foster results that inform later determinations. Thus, identification of lawful initial steps, such as interviewing appropriate disinterested witnesses in a way that does not breach confidentiality due the whistleblower, can spawn information that aids in determining the legality of possible subsequent steps, such as interviewing the whistleblower. Any lawful interview of the whistleblower, in turn, can help the company identify lawful ensuing options, such as whether to discipline or reward the whistleblower. At each stage, the company must keep its eye squarely on applicable whistleblower protection in determining which options are lawful.

**Sequentially Choose Lawful Options for Handling the Whistleblower and the Allegations**

It is not enough for the company to know that it has particular lawful options at a particular time. The company should choose from among the identified options, taking into account all relevant factors, including fairness, litigative risk and cost. Choices generally should be made sequentially, and a particular choice should not be made without sufficient information. Earlier choices should foster results that inform later, and often more significant, choices. Thus, early and fundamental procedural decisions, such as to initiate a basic inquiry into the veracity of the whistleblower’s allegations, can lead to more significant and complex procedural choices, such as whether to hire outside counsel to conduct
an internal investigation into the wrongdoing alleged by the whistleblower, whether to investigate possible wrongdoing by the whistleblower, and whether to attempt to interview the whistleblower.

This process should lead continually to the legal gathering of information ultimately sufficient to guide the crucial substantive decisions regarding treatment of both the whistleblower – such as whether to reward or discipline him/her – and the allegations, such as whether to self-report any legal violations to the government and whether and how to prepare for civil litigation. This surely is the company’s overarching goal: making sound decisions, with maximum flexibility and without legal liability, on all key substantive issues implicated by a whistleblower’s allegations. A company can obtain this goal by promptly spotting and addressing the unique issues implicated by persons properly categorized as “whistleblowers.”

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3 See, e.g., Dodd-Frank Act, Sec. 922(a) (defining “whistleblower” as “any individual providing certain information to the Securities and Exchange Commission).
4 See supra note 2.
5 See, e.g., 18 U.S.C. § 1514A(a) (prescribing “whistleblower protection” in certain cases for employees of publicly-traded companies regardless of whether they report to federal authorities or to their own supervisors).
6 Under a limited number of statutes, including Section 922 of the Dodd-Frank Act, a “whistleblower” may also be entitled ultimately to a monetary reward for reporting misconduct to government enforcers. The ramifications of this fact, and ways for companies to respond to whistleblowers potentially seeking such a reward, are beyond the scope of this article.
7 For example, the federal False Claims Act authorizes reinstatement with the same seniority, double back pay, special damages such as litigation costs and reasonable attorneys’ fees. 31 U.S.C. § 3730. Similarly, Sarbanes-Oxley authorizes “all relief necessary to make the employee whole” including reinstatement, back pay, and any “special damages” such as litigation costs (including expert witness fees and reasonable attorney fees). 18 U.S.C. § 1514A(c).
8 See 18 U.S.C. § 1513(e).
9 See supra note 3 and accompanying text.
10 See, e.g., Dodd-Frank Act, Sec. 1057 (protecting “any individual performing tasks related to the offering or provision of a consumer financial product or service.”).
11 See, e.g., id., Sec. 922(a); 29 U.S.C. § 158(a)(4) (deeming it illegal for an employer to “discharge or otherwise discriminate against an employee because he has filed charges [with] or given testimony regarding [to] the National Labor Relations Board.”).
12 “Reports made as part of an employee’s assigned normal job responsibilities are not covered by the [federal Whistleblower Protection Act] when made through normal channels.” Huffman v. Office of Personnel Management, 263 F.3d 1341, 1344 (Fed. Cir. 2001).