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WHISTLEBLOWER PRACTICE: WHAT ACCOUNTING PROFESSIONALS NEED TO KNOW

FEATURING HERB RUBENSTEIN, JD, MPA, DSS





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Learning Objectives

- Identify recent changes to the federal whistleblower laws and regulations.
- Recognize the ethics rules for accounting professionals regarding whistleblower laws.
- Recognize how the European Union and other countries are working with U.S. authorities to expand whistleblower claims internationally.
- Discover opportunities to help your clients or organizations establish "speak up programs" and protect whistleblowers.

See: January 15, 2020 Article in Accounting Today
<https://www.accountingtoday.com/opinion/whistleblower-protections-for-accountants-and-tax-professionals-bolstered-by-new-law>



Introducing Herb Rubenstein

- Author of business book for Financial Times – *Breakthrough, Inc.: High Growth Strategies for Entrepreneurial Organizations* (1998)
- Author, *Leadership for Lawyers* – 1st ed. NITA, 2005; 2nd ed. ABA, 2008
- Litigator DC, MD, VA, Colorado Federal Courts
- Georgetown Law, JD 1982
- Has represented whistleblowers and accounting firms for over 30 years

Goals

- Slides are yours – give them to others
- Use the material to teach others
- Not merely an “information course”
- My goal is help you do something tomorrow or even later today that you would not have otherwise done without taking this course
- And by being a leader, help someone else do something they would not have done without your leading or encouraging them

Operational Definition of Whistleblower

- On the simplest level, a whistleblower is someone who reports waste, fraud, abuse, corruption, or dangers to public health and safety to someone who is in the position to rectify the wrongdoing.

A whistleblower typically works inside of the organization where the wrongdoing is taking place; however, being an agency or company “insider” is not essential to serving as a whistleblower. What matters is that the individual discloses information about wrongdoing that otherwise would not be known.

- <https://www.whistleblowers.org/what-is-a-whistleblower/>

History of Whistleblower Law and Practice

- False Claims Act, 1863 due to Civil War
- WWII coverups and efforts to dilute the law
- 1986 False Claims Act amended and provided rewards for whistleblowers
- 1992 Mark Whitaker, former Divisional President of Archer Daniels Midland turns in ADM as part of a price-fixing cartel –Basis for movie – The Informant – worked with the FBI
- 2002 Sherron Watkins turns in Enron and Cynthia Cooper turned in WorldCom but both first complained internally - Time People of the Year

History of Whistleblower Law and Practice (Con't)

- 2002 - Coleen Rowley – Exposed FBI's slow action to threats before 9/11 – TIME Person of the Year with Sherron Watkins and Cynthia Cooper
- 2006-13 – Adam Resnick – Whistleblower against pharmaceutical companies
- 2009 – Cathy Harris – Exposed anti-black, racist policies at Hartsfield Airport in Atlanta

History of Whistleblower Law and Practice (Con't)

- August 6, 2012 IRS issues new ruling in Burkenfield case with 104m reward
- End of Swiss bank hiding Americans' money
- Shift in focus in laws from protection against retaliation to rewards, incentives, attorneys' fees
- Presidential Executive Order orders all federal employees to report illicit behavior
- 49 States have whistleblower protection laws

History of Whistleblower Law and Practice (Con't)

- EU in 2017 creates Whistleblower Protection Act and by Dec 17, 2021 all countries are required to have regulations in place to implement
- SEC is often lead agency in whistleblower matters; See: <https://boardandfraud.com/2020/09/26/tipsters-sec-adds-clarity-efficiency-and-transparency-to-its-whistleblower-award-program/>
- Since Dodd Frank - 2011 4,538 foreign whistleblowers have filed claims with US Gov under FCPA
- Now, 85% of Americans want more protections and rewards for whistleblowers- Marist <https://whistleblowersblog.org/whistleblower-news-network-survey/>

Polling Question Number 1

The first whistleblower law was:

- a. Passed in 1863, named the False Claims Act
- b. Passed during World War 1
- c. Passed during World War 2
- d. Passed in 1986

Whistleblowing Is Increasing

- <https://www.accountingtoday.com/articles/whistleblowing-soars-to-record-with-americans-working-from-home>
- 2021-2022 expected to be record years in terms of cases and payouts, fines for companies, more companies in US and Europe developing and implementing internal whistleblower protection and encouragement policies
- Accountants could have a much larger role going forward in shaping and helping implement internal controls, processes and policies for their clients or own organizations regarding whistleblowing

Whistleblowing Is Increasing (Con't)

- <https://sfmagazine.com/post-entry/november-2021-whistleblowing-laws-evolve/>
- <https://www.mceldrewyoung.com/irs-whistleblower/accountantwhistleblower/>
- And accountants can be whistleblowers
- See: PWC “Speak Up” paper from 2013:
<https://pwc.blogs.com/files/130813-striking-a-balance.pdf>

Covid and Whistleblowing

- 800 calls to SBA fraud and abuse hotline in 2019 and 100,000 calls in 2020 and more in 2021 all reporting PPP/bank loan fraud
- Remote working reduced workplace cohesiveness, reduced ability pre-emptively retaliate and scare workers not to report
- Opened up expanded government requests for whistleblowers through DOJ and agencies hotlines

Covid and Whistleblowing (Con't)

- Expanded opportunities for lawyers working remotely increasing their ability to connect with whistleblowers on a national scale, advertise, beef up websites and publications
- Cut government revenues, which leads to higher whistleblower fines and whistleblower rewards
- All covid impacts will stay in place after covid as it creates the new normal

Key Whistleblower Laws

- False Claims Act – 1963, Amended in 1986 to include rewards and strengthened also in 2009 and 2010 – Can include Treble damages
- IRS Rules and Regulations – Section 406 *Qui Tam*
- Securities and Exchange Act - Section 21F
- Commodity Exchange Act – Section 23
- Foreign Corrupt Practices Act
- Federal Mine Health and Safety Act – 1969
- Dodd Frank/Consumer Protection Act
- Motor Vehicle Safety Act
- Ocean Pollution, Wildlife Trafficking, Logging Laws

Key Whistleblower Laws (Con't)

- Fish and Wildlife Act
- Endangered Species Act
- Financial Institutions Reform, Recovery and Enforcement Act
- Consumer Protection Financial Bureau
- Confidentiality now protected
- Payments equal a minimum of 10% of recovery or fine
- Hundreds of billions of dollars of fraud recovered and fines in the billions
- Now 56 federal laws and more being considered

Key Whistleblower Laws (Con't)

- Sarbanes Oxley
- Transportation Laws
- RICO
- Obstruction of Justice Criminal Laws for retaliation
- Aviation Investment and Reform Act
- Deliberate ignorance no longer a defense
- “Materiality” provision limited by Judge Lambert’s decision in 2020
- <https://kkc.com/blog/false-claims-act-whistleblower-wins-key-materiality-victory/>

Key Whistleblower Laws (Con't)

- Trade Secrets Act – now employees can reveal “trade secrets” as a whistleblower
- All anti-discrimination (Title VII) laws, food safety, and key environmental and health finance laws have an anti-retaliation section against whistleblowers
- Key federal agencies have whistleblower protection offices and offices to handle reward payments
- Nuclear safety, military laws, labor safety (OSHA), pipeline, seaman, transportation safety all have whistleblower protections and incentives for whistleblowers

Key Whistleblower Laws (Con't)

- International
- EU passed law in 2017 and by Dec 17, 2021 every country has all regulations in place with strong whistleblower protections
- Will other countries follow? Will US AID help other countries pass whistleblower laws?
- Open question as authoritarianism fights for secrecy against democracy's transparency goal

Key Factors in Determining Rewards

- Accurate, timely, substantive, original (not known to the agency) information properly documented and handed over cooperatively
- Met all pre-requisites by statute to notify employer/agency and full compliance with law
- Save agency money and resources in enforcement
- Difficulty the government would have had in proving the illicit behavior without the full cooperation of the whistleblower
- Law provides usually between 10 and 30% of gov recovery and no limits on what an agency can pay

From a European and Corporate Perspective

- <https://www.integrityline.com/expertise/blog/what-is-whistleblowing/>
- Article by Moritz Homann 7/12/21
- Managing Director Corporate Compliance | EQS Group – Munich Germany
- Advising Corporations in Europe and Globally

Oil/Gas Lease Accounting Example

- Many steps and negotiation to get to exact lease terms
- Then general counsel's office or CFO's office produces final lease
- May not reflect actual terms of the lease documented through negotiations
- All parties can miss this and wrong amounts of payments are made costing one side of the other millions of dollars
- Actual case – Person in CFO's office did survey, 40% of leases wrong, costing millions, did not blow the whistle, even internally, due to fear of being fired, retaliated against, and company lost millions of dollars

Essential Whistleblower Strategies for Accounting Clients

- From the Corporate or Defendant's side
- Top officials and board of directors must encourage people working in company to come forward early and often with information about illicit behavior in the company and deal effectively with investigating and terminating the illicit behavior through written and properly followed procedures
- Guarantee strict anonymity/confidentiality to person providing information

Essential Whistleblower Strategies for Accounting Clients (Con't)

- Hire outside counsel to investigate all allegations or use General Counsel/Office of Compliance
- Run professionally staffed hotlines for each category of behavior of concern for reporting all illicit and regulation violating behavior inside the company and with third parties
- Regular, accurate reporting of results of hotline data to appropriate people in company, on board, and in appropriate federal filings
- Each complaint received must be an immediate “trigger” for *adequate* investigation

Essential Whistleblower Strategies for Accounting Clients (Con't)

- Example: Consulting company since 2012 has provided “hotline services” for country clubs at a cost of \$300 per month (Information provided by Mitchell Stump, CPA instructor at the PGA Associate Program)
- Country Clubs have a lot to lose including tax exempt status for violating 501 (c) (7) status, tips not being reported to the club, instructional fees not being reported to the IRS, sexual harassment, environmental regulation violations, discrimination in hiring, unsafe working conditions, food safety and preparation issues, theft, liquor license violations, golf cart operations by impaired golfers and other accident liabilities, premises liability, emergency health and weather preparedness and youth liabilities

Polling Question Number 2

Country Clubs use whistleblower hotline services because:

- a. They have a lot to lose if they lose tax exemption
- b. There are many ways that Clubs could have illegal or non-exempt activities going on
- c. There are many workplace risks of accidents
- d. All of the above

Essential Whistleblower Strategies for Accounting Clients (Con't)

- Employee feedback programs with different levels of urgency on each item of information
- Chain of evidence recorded, with each action item documented once evidence comes in
- Well funded internal adjudication process and appeal process for each person, including “C Level or board level” in company, accused of illicit or unethical behavior or violates company policy
- Excellent, permanent record keeping on the “outcome” and actions taken against “violators” of laws, ethics, regulations, company, organization policy

Essential Whistleblower Strategies for Accounting Clients (Con't)

- See: <https://www.bakertilly.com/insights/internal-audit-and-compliance-sec-awards-more-than> \$300,000 reward to member of the audit team – December 2020
- <https://www.accountingtoday.com/news/sec-awards-over-300k-to-auditor-whistleblower> - **4th time**
- Rule – SEC will not protect/pay for information from lawyers/accountants/auditors unless it fits in one of the huge exceptions provided for in **§ 240.21F-4 Other definitions**. Some recognition for confidentiality.
- <https://www.sec.gov/about/offices/owb/reg-21f.pdf>

Know the Exceptions

- From <https://www.sec.gov/about/offices/owb/reg-21f.pdf>
- **§ 240.21F-4 Other definitions.**
- (v) Exceptions. Paragraph (b)(4)(iii) of this section shall not apply if:
 - (A) You have a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the relevant entity from engaging in conduct that is likely to cause ***substantial injury*** to the financial interest or property of the entity or investors;
 - (B) You have a reasonable basis to believe that the relevant entity is engaging in conduct that will ***impede an investigation*** of the misconduct; or

Know The Exemptions

- (C) At least ***120 days*** have elapsed since you provided the information to the relevant entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or your supervisor, or since you received the information, if you received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or your supervisor was already aware of the information.

Essential Whistleblower Strategies for Accounting Clients (Con't)

- Organization of the General Counsel's office for direct supervision of all whistleblower type actions in the company or nonprofit organization
- Constant and rigorous research activities regarding all changes in whistleblower law, regulations, policies, investigations, outcomes of investigations
- Excellent screening of potential hires (KPMG example of hiring person from PCAOB)
- Constant risk analysis and anti-risk policy updates
- Rigorous “anti-cover up” policies/procedures with consequences (Oil Lease Example – failure to report)

Essential Whistleblower Strategies for Accounting Clients (Con't)

- Precise human capital and financial data analytics that constantly review cost and sales data to identify “outlier” situations where illicit activity might be driving (spiking) sales or increases in supply chain cost beyond predicted levels
- Rigorous employee survey system that can reveal where company procedures and policies are not violated (anonymous surveys, with an ID number to show employee’s division, supervisor, and the KPI employee most contributes to with their work)
- Rigorous “case management” system for all “cases” dealing with all illicit behavior in org.

Essential Whistleblower Strategies for Accounting Clients (Con't)

- Speak-UP policy and rewards for those who speak up and negative consequences for those who do not. See: <https://pwc.blogs.com/files/130813-striking-a-balance.pdf>
- Clear protocols for who can input information into the whistleblower/illicit behavior system, who reviews it, who evaluates on a regular basis the entire employee feedback and internal adjudication system
- Create office with clear job duties to prevent whistleblower firing, victimization, bullying, retaliation or illegally prescribed negative consequences for truthfully reporting illicit behavior inside the organization and that office must report to reviewer

Polling Question Number 3

A Speak-UP policy would likely encourage:

a. Employees going straight to the media with a complaint

b. Employees/Management communication

c. Gaining timely information about unethical or illegal conduct

d. B and C

Three Minute Break

- And we will continue with:
- Essential Whistleblower Strategies for Accounting Clients

Essential Whistleblower Strategies for Accounting Clients (Con't)

- Rigorous governance of third parties and their “internal whistleblowing” systems, especially internationally
- Periodic training on new whistleblower laws
- Willingness to report competitors’ violations of law and regulations to authorities
- Foster excellent working relationship between accounting staff, consulting companies, advisory companies, general counsel’s office with clear reporting requirements of all when they see non-compliant activity
- Diversity on the board with independent board members (note Goldman Sachs will not take a company IPO in 2022 unless it has a woman on the board of directors – See new CA law on this subject)

Essential Whistleblower Strategies for Accounting Clients (Con't)

- Clear procedures when an employee who has reported an issue to their superior, has not received a corrective response, how they can go up and over the chain of command without negative repercussions to the reporting employee
- Never ***“impede”*** an employee from reporting directly to a governmental authority as that is a violation of the law
- Clear process for any employee (as in the oil and gas sector) to immediately stop an unsafe or illegal activity (like emergency “stop” switch on trains) and then, after stoppage, report the issue or problem to supervisors
- Clear policy of reporting to all employees all whistleblower investigation results, both the internal ones and those conducted by government or third parties (investor groups)

Essential Whistleblower Strategies for Accounting Clients (Con't)

- Clear role and set of duties for everyone in the company when they come across evidence of illicit activity with no exceptions regarding duty to report and to take action
- Written Code of Conduct for the Company or organization with whistleblower section spelled out in great detail
- Internal, password protected, website section for employees for all information company should share regarding whistleblower accusations and findings (results of investigations, penalties given, and corrective actions taken)
- Zero tolerance policy for individuals determined to be the source of the problem(s) that a whistleblower reports, including termination, claw back of income paid, if appropriate, no letter of recommendation

Essential Whistleblower Strategies for Accounting Clients (Con't)

- Clear policy of when to report to the board of directors, the authorities or the public regarding all data and information suggesting a violation of law or regulation within the organization
- Written document preservation policies and harsh punishments for illicit document destruction (Note McKinsey email - opioid)
- Clear definition of “bribery” embedded in the Code of Ethics of the organization with real examples from previous experience in sector

Key Corporate Whistleblower Policies

- <https://investors.krispykreme.com/static-files/713e14e8-c338-4f7a-9e23-c6b80a05a923>
- Takes whistleblowing seriously involving their Audit and Finance Committee
- Refers to certain Whistleblowing activities and ***“Accounting Complaints”*** and investigates each one
- Company protects confidentiality/name of employees making the complaint
- Company accepts complaints from non-employees
- Five year records retention as to all investigations

Key Corporate Whistleblower Policies (Con't)

- <https://corporate.arcelormittal.com/investors/corporate-governance/whistleblower>
- Whistleblowing report form for internal use at ArcelorMittal
- Beware of order reinstating a whistleblower by US Department of Labor, See: OSHA - <https://www.dol.gov/newsroom/releases/osha/osha20210628-0>
- \$763,000 in damages plus attorneys' fees AND reinstatement – employee credited with bravery

Essential Whistleblower Strategies

- ***If you are the whistleblower*** - Lawyer up immediately as some statutes have a 30-day statute of limitations
- Stay stealth and keep client confidences
- Make sure disclosure is protected (discussed later)
- Find and target the applicable law
- Seek anonymity for yourself if law allows or requires
- Prepare for backlash and retaliation and monitor client's mental health

Internal Auditor As Whistleblower

- See:
<https://www.cpajournal.com/2021/10/20/whistleblowing-intentions-for-internal-auditors/>
- CPA Journal Auditor views internal whistleblowing as a good thing. Seeks to promote it
- Encourages that internal auditors have a high level of “psychological security” and no fear in reporting accounting irregularities internally and having them dealt with appropriately

Accountants As Whistleblowers

- From Thomson Reuters – one hour audio ***From 2012***
- <https://www.secwhistlebloweradvocate.com/insights/presentation-accountant-whistleblowers/>
- See also: ***From 1995***
<http://archives.cpajournal.com/old/16641852.htm>
- Conceptual framework:
 - Duty of loyalty to investors
 - Duty of loyalty to the truth
 - Duty of loyalty to the values of the accounting profession
 - Accountants know what is going on

Essential Whistleblower Strategies

(Con't)

- Make sure your collection of information does not violate the law, like telephone recordings by single party to the conversation (OK in many states)
- Promote aggressive collection and preservation of data – record, record, record
- Make sure you are the original source of information to the government if possible
- File Claim with lawyer and choose best venue
- Pursue discovery and seek other “witnesses”
- Source: *The Whistleblower’s Handbook: A Step by Step Guide to Doing What’s Right and Protecting Yourself* (2017 Lyons Press, Stephen Kohn, Esquire)

Essential Whistleblower Strategies

(Con't)

- Note: IRS tax cheat whistleblower claims are filed with the IRS, not a lawsuit
- Form 211 filed with the Whistleblower Office of the IRS
- Whistleblower can appeal the “reward ruling” to the US Tax Court – 30 day time limit
- Whistleblowers, including accountants who ‘participated in’ the fraud are allowed to recover qui tam rewards, but not if they planned the fraud
- Auditors and Corporate Officials can receive \$\$\$ if they report internally first and then to gov.

Polling Question Number 4

What is the proper way to file whistleblower accusations against a taxpayer for cheating on taxes:

- a. Must file lawsuit in federal court
- b. Must have an accountant file the document with the client's signature to the IRS
- c. File with the IRS Using Form 211
- d. Must report to the US Attorney General

FCPA

- Foreign Corrupt Practices Act
- Company can be liable for “third party” that paid bribe or violated the law at the express direction or implicit authorization to do so on behalf of the corporation
- Fines by FCPA up to 2m per violation with commensurate rewards, but up to 25m in fines per violation by SEC and other agencies; Many violations can make fines huge
- 5 year statute of limitations but can be lengthened by “conspiracy theory” which continues past the original action...and examples of gov going back 15 years
- Related actions – if whistleblower notifies one agency and other agencies investigate and add penalties, whistleblower gets paid for those collections as well

US Department of Labor

- Key agency in employee matters dealing with whistleblowers – SEE:
- https://www.dol.gov/agencies/oalj/PUBLIC/WHISTLEBLOWER/REFERENCES/CASELISTS/FEDERAL_2020
- https://www.dol.gov/agencies/oalj/PUBLIC/WHISTLEBLOWER/REFERENCES/CASELISTS/FEDERAL_2021
- Beware of order reinstating a whistleblower by US Department of Labor, See: OSHA - <https://www.dol.gov/newsroom/releases/osha/osha20210628-0>
June 28, 2021
- \$763,000 in damages plus attorneys' fees AND reinstatement – employee credited with bravery in agency ruling. No amount released for attorneys' fees but could exceed one million dollars

Polling Question Number 5

When a whistleblower is deemed entitled to reinstatement, but cannot work at the organization due to past retaliation, the employee is entitled to:

- a. Punitive damages
- b. Front pay for future lost wages
- c. Attorneys' fees
- d. None of the above

FBI and Intelligence Communities

- Some whistleblower protection per 2014 act for the Intelligence Community and FBI Act from 1976, 1986 and 2016 amendments
- Not as strong in either protection or rewards as other statutes and often no money is at issue
- Duty to investigate is the key in these statutes
- Employee protections in place, but life can be made very hard for FBI whistleblowers

Concept of Protected Disclosures

- Most statutes, including the FCA, require notifying the employer or agency first, then filing claim stating the prerequisite is essential to “protect” the disclosure
- Some laws state you have to file it with exactly one office or you can lose your case
- Filing procedures are exacting and precise
- FCA – file, under seal, cannot discuss publicly and must file with the Attorney General of the US – can lead to treble damage awards by DOJ – See:
https://www.morganlewis.com/-/media/files/publication/outside-publication/article/bna_calculatingdamagesunderfalseclaim_sact_may2013.pdf
- Reports to the media may or may not be protected by statute – Facebook case of interest

Harvard Business Review and Forbes

- Many public articles now about whistleblowing
- <https://hbr.org/2020/01/throw-out-your-assumptions-about-whistleblowing>
- Company fined by SEC for telling employees it had to report all allegations about the company to the company before going to the SEC: Other companies fined as well for similar policies:
<https://www.forbes.com/sites/insider/2021/07/09/companies-better-not-tread-on-whistleblowers-right-to-report/?sh=6c09a66ade31>

Review of Some Cases

- 2016 - Gunther v. Deltek in Virginia – Ms. Gunther reported fraud to boss and was fired. Deltek claimed she was “confrontational” at meeting, but she had recorded the meeting (legally in Virginia) and judge ruled she was not confrontational – beware of “bogus rationale”
- She took documents from company and judge ruled that was permissible as it was done for the sole purpose of exposing the wrongdoing
- Got old job back, back pay, attorneys fees per Sarbanes Oxley

Some Recent Cases (Con't)

- <https://whistleblowerinfocenter.com/resources/blog/recent-whistleblower-cases-2019/>
- 2019 - Duke University pays \$112m fine for falsifying data to get research contracts and whistleblower gets 34m reward in 2019
- 2019 - Walgreens paid \$209m for whistleblower claim it was dispensing insulin pens to patients who did not need them; Award amount unknown

Review of Some Cases (Con't)

- 2018 - Nurse awarded 5.2m by Jury after 8 day trial and two hours deliberation for refusing to double dose patients at Heritage Health, which runs 50 nursing homes, and refused to file false reports as the company was repeatedly violating the law. Nurse turned in a whistleblowing claim after objecting to illegal practices.

Review of Some Cases (Con't)

- October 2020 – Whistleblower gets \$114m from settlement; defendant and whistleblower not disclosed – SEC payment
- 2020 - Verizon/AT&T/Sprint whistleblower spot received a \$51 million award; South Korean received \$37 million under FCPA; Visiting Nurse Service of New York former administrator and whistleblower received \$16.5 million on 57m fine.

Review of Some Cases (Con't)

- August 2020 - Longwood Nursing Home, CA 16.7m fine, 3m reward for whistleblowers – Key takeaway Longwood's skilled nursing facilities “will be closely monitored over the next five years.”
<https://www.whistleblowergov.org/healthcare-and-pharma.php?article=three-whistleblowers-share-3-million-award-after-exposing-medicare-fraud-at-longwoods-skilled-nursing-facilities> 174
- June 2021: **Manhattan U.S. Attorney Files Suit Against Eleven Skilled Nursing Facilities And Their Management Company, Owner, And A Senior Employee For Fraudulently Billing Medicare For Unnecessary Services**
<https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-files-suit-against-eleven-skilled-nursing-facilities-and-their>

Review of Some Cases (Con't)

- 2021 DOJ intervenes in whistleblower suit against HCR Manor Care, one of the largest nursing home companies, for 1,200 allegedly fraudulent bills submitted to medicare/medicare from 2006 to 2012
- 2021 Novartis agrees to 642m settlement agreement, whistleblower award to be determined while pharmaceutical companies lobby Congress to limit new whistleblower laws
- November 2021 – Two people share \$200m whistleblower award paid by the CFTC

Review of Some Cases (Con't)

- June 2021 - DOJ Intervenes in Integra Med Analytics' \$129 M Medicare Whistleblower Suit Against NY-Based Skilled Nursing Facilities, Management, and Ownership. Following its own investigation of Integra's allegations, DOJ filed its own complaint-in-intervention alleging that the very schemes identified by Integra continued through 2019.
- DOJ's complaint-in-intervention alleges that from at least January 2010 through September 2019, the Defendants systematically kept Medicare patients at the Facilities longer than reasonable or necessary, and put those patients on higher levels of rehabilitation therapy than reasonable or necessary. These practices were designed to increase the amounts billed to Medicare beyond what was justified based on patients' clinical needs. In some instances, the Facilities went so far as to intentionally limit patients' progress in order to create the appearance of a continued need for services.
- Source:
<https://www.businesswire.com/news/home/20210604005590/en/DOJ-Intervenes-in-Integra-Med-Analytics'-129-M-Medicare-Whistleblower-Suit-Against-NY-Based-Skilled-Nursing-Facilities-Management-and-Ownership>
BusinessWire is a Berkshire Hathaway Company

Review of Some Cases (Con't)

- July 2021 Interface Rehab to Pay \$2 Million to Resolve False Claims Act Allegations – More Medicare Fraud Claims - <https://www.justice.gov/opa/pr/interface-rehab-pay-2-million-resolve-false-claims-act-allegations>
- This civil settlement includes the resolution of claims brought under the *qui tam* or whistleblower provisions of the False Claims Act by Keith Pennetti, a former Director of Rehab at Interface. Mr. Pennetti will receive \$360,000 of the settlement proceeds. The *qui tam* case is captioned *United States ex rel. Pennetti v. Interface Rehab, et al.*, No. CV-14-4133 (C.D. Cal.).
- August, 2021 - H.I.G. Private Equity settles with SEC for 19m fine for medicare/Medicaid fraud for company it bought – New Trend like piercing the corporate veil

Review of Some Cases (Con't)

- Claim denied by US Tax Court (IRS case) for reward - facts given by whistleblower started an investigation, investigation found tax law violations, but the violations that triggered the fines were not directly related to the “under reporting of income” information provided by the whistleblower
- December 1, 2021
<https://www.journalofaccountancy.com/issues/2021/dec/whistleblower-award-denied.html>
- Key *nexus* argument for payment of reward, but whistleblower’s claim did start massive investigation by the IRS and subsequent fine for company
- *Lissack*, 157 T.C. No. 5 (2021)

Polling Question Number 6

A new trend in SEC whistleblower cases is:

- a. Going after health care fraud
- b. Going after Private Equity funds for fraud and false claims
- c. Going after international cases
- d. Going after PPP fraud with treble damages

Helping Clients Avoid Retaliation and Damages for Retaliation

- Whistleblowers must prove firing official (or any person involved in any way regarding an “illegal” firing) knew other party was “the whistleblower” – but not “willful ignorance” or “ostrich” defense
- Company must have another legitimate motive for firing worker or giving a negative performance review or other “adverse action” against an employee which must be carefully documented
- Beware if whistleblower can prove “disparate treatment” vs other employees without proper organization reason for such treatment
- New test – “contributing factor” test to firing, neg Perf. Rev.
- When the fight is to keep the job – important for company as there are big stakes, back pay, front pay, legal fees, reputation loss, etc.
- Retaliation can come when little or no money is at stake – beware of organization seeking to cover up retaliation as that brings with it a new host of penalties – See Damages slides next

Damages for Retaliatory Firing per US Department of Labor

- Interest on all damages
- Attorney's fees and qui tam damages for gov recovery of funds – included in almost all whistleblower laws
- Reinstatement or “front pay” - lost future earnings as proven by a labor economist when there is “no reasonable way” a person can continue to work for company
- Back pay and all benefits including lost overtime pay, vacation time, seniority benefits, retirement benefits lost
- Compensatory and punitive damages including compensation for forced sale of assets (house, car, liquidation of stock which appreciated – all very broadly defined)
- Job search expenses and medical expenses - all broadly defined;
- Letter to all employees explaining the retaliation/firing;
- Job recommendation letter and mandatory company training

Nondisclosure Agreements

- Prohibited by SEC, Macktal Ruling, Title 17 CFR Section 240.21F-17 – can never impede an employee from communicating with the SEC Or any government agency or licensing authority) about financial wrongdoing; big fines and penalties
- Violates public policy and lawyers and accountants on both sides must know the limits of nondisclosure agreements

Effectiveness of Whistleblower Laws

- Justice Department Recovers Over \$2.2 Billion from False Claims Act Cases in Fiscal Year 2020
- 672 qui tam cases filed in 2020
- Very, Very cost-effective enforcement from government's perspective
- Allows for participatory democracy and participation in law enforcement to protect the public
- Rewards truth telling and even protects it
- Huge money given to whistleblowers and their attorneys
- Forces companies to have internal, effective hotlines, where people willingly share problems and watch them get fixed (or not). Many corporations getting the message that a person within the organization reporting wrongdoing is a very valuable asset

Polling Question Number 7

Governments generally believe whistleblower laws are effective because they:

- a. Save money/resources enforcing laws
- b. Bring in substantial revenue
- c. Bring in cases government would not have known about
- d. All of the above

Management Information System

- For accountants and defense counsel it is essential to know/understand what is happening within your organization daily regarding the case
- Data analysis – especially for defendant organizations, they must have strong capabilities here - so hire or recruit staff person for the position “data scientist” or have accountants perform this key role
- For corporations - Regular internal reports must be kept on a computer system where the “right” people have access to these reports and can comment on them
- Corporate defendant organizations must have quantitative measures reporting both the performance/execution of the whistleblower defense, encouragement, data analysis and action plan when illicit or unethical activity is reported – accountants can play a huge role here
- Surveys of employees can be performed by accounting firms and data surely can be analyzed by accounting firms

Traditional and Social Media's Role Whistleblowing

- Adds to whistleblower credibility when telling the truth
- Gives “home field” advantage to the whistleblower as company will not venture there
- Increases the stakes for all parties, but especially the company or agency being targeted by the whistleblower
- Must be carefully managed by defendant organizations or can create huge backlash
- All sides need professional support in dealing with social media for every whistleblower case

Create and Manage Your Brand

- As an accountant who helps clients avoid, prepare for, and minimize whistleblower claims
- Every brand (how you/your firm or even the general counsel's office is viewed) starts with "credibility"
- You must convince others the whistleblowing services you offer are backed up by back-office systems to ensure compliance and the understanding of all procedural steps in whistleblowing cases and in preventing/minimizing the damage due to whistleblowing cases

Brand (Con't)

- Brand is composed of:
 - Content including logos, music, colors, typeface, clothing
 - Education and legal research capabilities
 - Public Relations
 - Access to people, media (social and print)
 - Using understandable language
 - Consistency with client goals, ideas of progress, values
 - Quality of your library, electronic and books
 - Message discipline
 - Building on the past, creating the future, keeping up to date and ability to predict future trends/activities in area
 - Careful risk assessment

Think International

- World is coming around to embrace whistleblowers including E.U., IESBA, the International Bar Association
- Companies are building in large roles for corporate and defense counsel to be involved in every stage of whistleblower, reporting of illicit activity throughout the organization and third parties with whom the company does business
- Canada - excellent partner in legal development area
- EU - great partner in legal development area
- Start local, even with a state law, but keep eyes open for international scope of fraud

The Upside (Con't)

- On both plaintiff and defendant/client side - Whistleblowing can be used to help stop or interrupt discrimination, bias, sexual harassment, environmental degradation, ethics violations, governance lapses, scandals and fraud that occur within your own place of employment or in a client organization
- Can help donors undercover “truths” about organization where they have donated or participate
- Can help stop fraud and bad actions and actors before they do as much damage as they would have done without the whistleblower coming forward

Oil/Gas Lease Accounting Example

- Many steps and negotiation to get to exact lease terms
- Then general counsel's office or CFO's office produces final lease
- May not reflect actual terms of the lease documented through negotiations
- All parties can miss this and wrong amounts of payments are made costing one side of the other millions of dollars
- Actual case – Person in CFO's office did survey, 40% of leases wrong, costing millions, did not blow the whistle, even internally, due to fear of being fired, retaliated against, and company lost millions of dollars

Polling Question Number 8

The real lesson from the oil/gas example is:

- a. Fear of job loss can prevent people from saying their boss is making mistakes
- b. Speak Up mentality can save company money
- c. A potential whistleblower is an asset
- d. All of the above

Conclusion

- Whistleblowing law is here to stay and legal protections and rewards for whistleblowers and their counsel will only increase
- Companies and nonprofit organizations with the help of accountants can develop protocols, policies, and procedures to benefit from those in the organization who want to report illicit and unethical activities internally

Conclusion (Can't)

- Someone in the C-suite needs to be in charge of all corporate whistleblowing activities
- Boards of Directors/Audit Committee must be involved
- Accountants have a tremendous opportunity to help companies deal with and prepare for whistleblowing situations
- Whistleblower internal controls and processes are very procedure intensive and require significant back office/case and records management

Conclusion (Con't)

- Existing laws plus new state and federal laws under consideration all providing greater and great protections and larger rewards for whistleblowers
- Many federal agencies covered under False Claims Act and other laws
- Rigorous record keeping is essential on both sides of every case and every item uncovered internally in a whistleblowing setting
- Great upside for accountants, internal auditors and the accounting profession at large from the evolution of whistleblower laws and legal practice

Conclusion (Con't)

- Laws are very precise and easy for client to make a mistake which vitiates their protection and prevents them from getting a reward
- Companies can mitigate their potential losses by being proactive, installing a “speak up” culture, whistleblower protections, quick action on whistleblower reports and including using human capital/predictive analytics to see unusual behavior/results in sales or costs that may be the result of bribery or illicit behavior

Conclusion (Con't)

- Risk assessment should guide company pre-investigations into illicit or unethical behavior
- Whistleblower law has come a long way in the past several decades and more changes are to come
- Great opportunity for the accounting profession and accountants in so many roles in the world of whistleblowing
- Time to think of “whistleblowing” or internal reporting of fraud and unethical conduct within organizations by employees and advisors as a great benefit to the long run viability of organizations

Thank You and Contact Information

- Feel free to share these slides with anyone
- Keep me posted on any questions you might have and on your change efforts by reaching out to me
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