

BITING THE HAND THAT FEEDS: WHEN YOUR COMPLIANCE OFFICER TURNS ON YOU

It is part of every executive's job to ensure that any program he or she implements complies with the law. Certainly, it is a general counsel's job to advise his employer that a certain course of conduct might violate the law. One would think, then, that executives and attorneys who do their jobs by ensuring that their employer does not violate the law are not "whistleblowers." But a California jury disagreed, awarding \$8 million to a former general counsel who told his employer that he thought the company might have violated a federal statute. This raises an important question - when are your employees just doing their jobs, and when are they whistleblowing?

Over the last ten years, the term "whistleblower" has become a common part of the employment litigation landscape, thanks in large part to such sweeping legislation as the Sarbanes-Oxley Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act. These statutes are aimed at preventing financial scandals like Enron or the housing crash in 2008 by encouraging individuals with knowledge to report financial misconduct.

Given the extremely high stakes that come with public disclosure of even unfounded allegations of financial misconduct, however, thousands of companies have established a "compliance officer" position, or enacted a policy identifying some pre-existing position (such as the CFO or General Counsel) as the person who should receive concerns about financial misdeeds. This allows concerns to be addressed internally, promptly, efficiently, and without the irreparable harm to a company's reputation that can come with public allegations of financial misconduct.

The \$8 million jury verdict in Wadler v. Bio-Rad Laboratories, Inc., however, threatens to undermine the entire concept of internal reporting of suspected financial misconduct. In finding for the general counsel on his whistleblower retaliation claims, the jury rejected the employer's argument that the general counsel was doing his job in giving the company legal advice. The jury was also apparently unmoved by the employer's argument that the general counsel was simply wrong in thinking that normal business practices were actually illegal.

Perhaps even more concerning was the Court's finding that the general counsel's self-interest in pursuing a whistleblower claim outweighed the company's interest in maintaining the attorney-client privilege.

This verdict is certainly troubling for employers who wish to encourage the internal reporting of any legal concerns. Should employers still place individuals in "compliance" positions at the risk that any information they share may later be used against them in a whistleblower lawsuit? Or should the employer not encourage internal reporting and run the risk of either public whistleblowing or legal violations?

For now, it appears that each business, in conjunction with counsel, will have to analyze its own legal exposure and design an internal reporting program that makes sense in the context of its own legal and regulatory environment. While President Trump issued an executive order to review and dismantle certain provisions of Dodd-Frank, it is unlikely that the whistleblower protection provisions will be repealed. The current Republican-approved outline for dismantling Dodd-Frank is the Financial CHOICE Act, sponsored by Republican Jeb Hensarling, (R) Texas, who is reported to be a supporter of the whistleblower provisions. Although the agencies such as the SEC or CFTC may place less emphasis on whistleblower enforcement than they did during the Obama administration, the availability of private litigation will require employers to remain vigilant to potential whistleblowers in their midst.

Given the cost of litigation and the risk of an adverse jury verdict, employers should be extremely cautious before taking any adverse action against a whistleblower. As indicated by the Wadler verdict, however, identifying exactly who is and who is not a whistleblower is not always easy.

Our firm is available at any time to answer any questions or discuss these laws.

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