



## **Before the Whistle Blows**

Practical Guidance for Managing and Mitigating Whistleblower Retaliation Risks

**Debevoise  
& Plimpton**

Let's talk about



## Overview of Dodd-Frank Whistleblower Program

Practical Guidance for Handling  
Whistleblower Complaints

Global Reach of Dodd-Frank  
Whistleblower Provisions

Hypothetical Whistleblower Scenarios



# Dodd-Frank Whistleblower Protections

## Section 922

The Dodd-Frank whistleblower bounty program expanded on existing SOX 806 Protections:

- Allows whistleblowers to go directly to the SEC
- Offers confidentiality protections
- Broadly protects whistleblowers from retaliation

# SEC Whistleblower Stats

\$22M

Second highest  
award to date

4,218

Tips received FY  
2016

\$149M

Total awarded to date

\$30M

Highest award to  
date

41 

Whistleblowers  
rewarded to date

104 

Countries where tips  
originated to date

18K+

Tips received to date

80%

Employees first  
report internally

# Whistleblower Protection Statute

## **Broad Application:**

“Employers may not discharge, demote, suspend, harass, or in any way discriminate against you...”

## **SEC Enforcement Authority:**

Dodd-Frank anti-retaliation provisions “shall be enforceable in an action or proceeding brought by the Commission.”

## **Whistleblowers Need Not Be Right:**

Protection applies if person possesses a “reasonable belief” of a possible violation.

# Federal Court Rulings on Anti-Retaliation Protection for Internal Reporting

Federal courts are divided:

- ***Asadi v. G.E. Energy (USA), LLC***: Dodd-Frank affords retaliation protection only to whistleblowers who report to the SEC
- ***Berman v. Neo@Ogilvy LLC* and *Somers v. Digital Realty Trust Inc.***: Dodd-Frank protects whistleblowers who only report internally, even if they do not report to the SEC



# Whistleblower Protection Statute



Let's talk about



Overview of Dodd-Frank Whistleblower Program

**Practical Guidance for Handling Whistleblower Complaints**

Global Reach of Dodd-Frank Whistleblower Provisions

Hypothetical Whistleblower Scenarios





# SEC Whistleblower

## Rule 21F-17

Rule 21F-17 prohibits *“tak[ing] any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.”*

# In the Matter of KBR, Inc.

## Confidentiality statement at issue:

*“I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, **without the prior authorization of the Law Department.**”*

SEC cited potential chilling effect

Enforcement action, plus \$130,000 penalty

# BlueLinx Holdings Inc., Health Net, Inc., Anheuser-Busch InBev, Blackrock, Inc., and HomeStreet, Inc.

## BlueLinx's problematic language:

*“Employee has not and in the future will not use or disclose to any third party Confidential Information, **unless compelled by law and after notice to BlueLinx.**”*

BlueLinx, Health Net, BlackRock, and HomeStreet  
had SEC recovery waivers

AB InBev had liquidated damages penalty for non-disclosure violations

Enforcement action, plus \$265,000, \$340,000, \$3 million,  
and \$340,000 in penalties

# Compliance with Rule 21F-17

Confidentiality provisions in employee agreements.

Code of conduct and employee compliance manuals

Benefit plan documents

Severance and settlement agreements

# Practical Considerations for Legal and Compliance

*Upjohn* warnings in light of whistleblower rules

Maintaining whistleblower confidentiality

Caution during internal reviews involving current employees

Identifying actions that may constitute retaliation

# Other Considerations for Legal And Compliance

Considerations before taking any adverse employment action

Whistleblowers who disclose or take privileged information

Indemnification and advancement for whistleblowers

Let's talk about



Overview of Dodd-Frank Whistleblower Program

Practical Guidance for Handling Whistleblower Complaints

**Global Reach of Dodd-Frank Whistleblower Provisions**

Hypothetical Whistleblower Scenarios



# International Whistleblowers

Whistleblower tips increasingly coming from outside the U.S.

FY 2016 – SEC received tips from whistleblowers in 67 countries

Highest number of tips from Canada, UK and Australia



# Global Reach of Dodd-Frank's Whistleblower Protections

Dodd-Frank silent on extraterritorial application

Presumption against extraterritorial application under *Morrison*

No extraterritorial application of anti-retaliation provisions under *Liu Meng-Lin v. Siemens AG*

SEC's territorial nexus theory to determine extraterritorial application of bounty provisions

Let's talk about



Overview of Dodd-Frank Whistleblower Program

Practical Guidance for Handling Whistleblower Complaints

Global Reach of Dodd-Frank Whistleblower Provisions

**Hypothetical Whistleblower Scenarios**



# Scene 1: Jane & Joey



# What should Jane Do?

- A. Investigate the ACME numbers on her own.
- B. Ask other employees if they have noticed discrepancies.
- C. Do nothing; there has been no official report.
- D. Immediately call the Chief Legal Officer.





I think it is a mistake that we are/are not doing this.



Is this above board?



This error is material.



This looks like creative accounting.



I'm concerned about a certain practice.

## What Does A Complaint Look Like?



I want to talk to you about something serious.



This is a violation of law.



I think this might be important.



There is a problem that could lead to a huge mess.



No one has been listening to me.

## Scene 2: Jane & Joey



# Was there Unlawful Retaliation

A. Yes

B. No



**Debevoise  
& Plimpton**



Fewer work hours



Heightened scrutiny  
of performance



Desk moved  
to the  
basement



No longer invited  
to meetings

## What Does Retaliation Look Like?



Denial of family  
medical leave



Reassigned to less  
meaningful work



Firing reporter's  
fiancé, a co-worker



Unjustified negative  
evaluations



## Scene 3: Jane & Joey



What did Jane do wrong?



## Scene 4: Jane & Joey



# How You Can Mitigate Risk

Model a culture of compliance

Maintain confidentiality

Ensure consistent treatment of reporting employee

Avoid abrupt changes to previously unenforced policies

Monitor for retaliation from others

Consult Legal before taking any adverse action



# Compliance is an ongoing concern



If you have questions please contact:

**Arian June**  
ajune@debevoise.com

This material is for general informational purposes only and does not represent our legal advice as to any particular set of facts; nor does it represent any undertaking to keep recipients advised of all relevant legal developments.

© 2017 Debevoise & Plimpton LLP