Employment law and its intersection with whistleblower laws

When employees seek out employment attorneys, any underlying whistleblowing claims ought to be explored

By Aelish M. Baig

The False Claims Act (31 U.S.C. §§ 3729-3733) is a powerful tool used to combat fraud against the government. A whistleblower may be entitled to bring suit in the name of the government under the False Claims Act if the whistleblower is the original source of information related to conduct that cheats the federal government or causes the wrongful expenditure of government funds. The whistleblower must have direct and independent knowledge of the wrongdoing and voluntarily provide such information to the government before filing a whistleblower action.

Securities and tax frauds are handled under parallel whistleblower provisions in the U.S. Securities and Exchange Commission (SEC) Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) (Pub. L. No 111-203, 124 Stat. 1376) and Tax Relief and Health Care Act of 2006 (Tax Act) (Pub.L.No. 109-432, 120 Stat. 2922) whistleblower programs, respectively.

The False Claims Act

The most robust, and oldest, of these whistleblower programs is the False Claims Act (FCA). The FCA is a unique federal statute in that it allows a private party to bring an action on behalf of the federal government for fraud committed against the government. Such a lawsuit is called a *qui tam* complaint, and the whistleblower is known as the "relator." While the details and nuances of the FCA are beyond the scope of this article, the key point of the statute that an employment lawyer should keep in mind is that the relator must have original information related to fraudulent schemes involving government funds. A *qui tam* lawsuit is mechanically very different from a typical civil lawsuit in that it *must* be filed under seal, and *must* be presented to the government before any pretrial procedures take place (e.g., discovery, scheduling conferences, motions under Rule 12 of the Federal Rules of Procedure, etc.). Given the unique nature of *qui tam* cases, it is critical that an employment lawyer presented with a client with potential FCA issues immediately consult with counsel who has experience with and knowledge of the intricacies of the FCA statute and its logistical quirks.

Dodd-Frank Act; Tax Act

The other two major whistleblower programs mentioned above – under the Dodd-Frank Act and Tax Act – are relatively nascent in their development compared to the FCA, and differ in one significant aspect. Neither the Dodd-Frank Act or Tax Act whistleblower programs involve actual litigation. To initiate a whistleblower action under either program, a whistleblower (generally with the assistance of counsel) simply completes and files a form with the appropriate governing agency (SEC or IRS), informing the agency of the fraud or abuse. But despite this more simple procedure, it is still critical that employment lawyers fully appreciate the vagaries of the law as it relates to the Dodd-Frank Act and Tax Act whistleblower statutes. This is because there are often times when cases, on their face, do not appear to fit neatly under either whistleblower program but are nonetheless of interest to the SEC or IRS. In such circumstances, experienced whistleblower counsel may be able to provide the necessary baseline guidance and information to assist an employment lawyer confronted with such issues.

Regardless of the type of whistleblower program involved, employment lawyers are in a unique position to tap into the inner workings of various fraudulent schemes through their representation of employees. Current and former employees seeking legal advice are often privy to the mechanics of the fraudulent practices employed by their companies. For example, a terminated employee may seek legal counsel from an employment attorney, arguing her termination was in retaliation for her objection to the company's improper billing of Medicare, off-label marketing, drug bundling, tax evasion or any one of a number of other schemes used by companies to defraud the federal government. In light of the unique position in which these employees find themselves, and the special information these employees often possess about their employers, employment lawyers need to be keen to potential whistleblower issues – especially when the potential rewards (on both a personal and pecuniary level) can be so significant.

Fraud against the government is pervasive and widespread across many industries, and the possibilities are nearly limitless. Common types of cases arise in the health care, defense and financial sectors, and employment lawyers should be especially attuned to such areas.

Recent notable cases

• A whistleblower case against pharmaceutical manufacturer GlaxoSmithKline PLC ("Glaxo"), in which two employees provided the government with evidence of Glaxo's nationwide schemes

to market Advair, Wellbutrin, Paxil and other popular prescription drugs for unapproved off-label uses, causing Medicare and Medicaid to incur massive losses. This and related whistleblower actions settled for approximately $2 billion in 2012. (*United States et al. ex rel. Gerahty, et al. v. GSK et al.,* No. 03-10641 (D. Mass. filed Apr. 7, 2003).) A similar case was brought against Allergan for its off-label marketing of Botox and settled civilly for $225 million in 2010. (U.S. Dept. of Justice, Allergan Agrees to Plead Guilty and Pay $600 Million to Resolve Allegations of Off-Label Promotion of Botox http://www.justice.gov/opa/pr/2010/September/10-civ-988.html.)

• A whistleblower case brought by two security guards against their employer, AKAL Security Inc., one of the largest contract security providers in the country. As a result of the allegations that AKAL was making false claims for payment under work contracts with the government after failing to satisfy weapons qualification and other training and man-hour requirements, the Company agreed to settle the action in 2007 for $18 million. (U.S. Dept. of Justice, security Firm to Pay U.S. $18 Million to Resolve Allegations that Firm Failed to Provide Qualified Guards for Army Bases www.justice.gov/opa/pr/2007/July/07_civ_500.html.)

• A whistleblower case brought by two mortgage brokers who revealed widespread mortgage abuses, including that certain lenders were charging veterans hidden fees on mortgage refinancing – a violation of the government's Interest Rate Reduction Refinancing Loans Program. The case settled for a total of $45 million with JPMorgan Chase & Co. as one of five whistleblower suits against various lenders that settled for a total of $227 million. (JPMorgan Chase Settles Whistleblower Lawsuit Alleging Fraud in Veteran Loans for $45 Million, http://www.bloomberg.com/apps/news?pid=conewsstory&tkr=JPM:US&sid=aQEC5m2oD63U.)

• A whistleblower case brought by relator Floyd Landis and recently joined by the U.S. government alleging that Lance Armstrong and his cycling team Tailwind Sports defrauded the U.S. Government by using illegal drugs while racing under contract with, and being funded by, the U.S. Postal Service. This action is still pending. (Liz Clarke, Floyd Landis Whistleblower Suit Targets More than Lance Armstrong, *Washington Post* http://articles.washingtonpost.com/2013-01-17/sports/36409945_1_tour-de-france-titles-whistleblower-suit-floyd-landis.)


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