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Beware of Potential Criminal Implications for the Improper Handling of a Whistleblower Investigation

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When a company learns it is the subject of a whistleblower allegation, a strategy regarding how to defend against those allegations is, and should be, the primary concern. Accordingly, time, energy and money will be spent on developing a defense strategy that focuses on the allegations the whistleblower has made. However, time, energy, and potentially money, needs to be spent on ensuring the company does not unintentionally make the situation worse by retaliating against the whistleblower.

Whistleblower complaints are increasing in number, in part because the government has created financial incentives to become a whistleblower. Being named in a whistleblower investigation is stressful, and emotions are heightened. During this time, steps should be taken to limit the potential for any retaliation claim, because if retaliation does occur, it opens up the possibility of not only civil damages, but also potential criminal prosecution.

While there is a lot of focus on the potential civil claims for retaliation, often the potential criminal liability for retaliation is overlooked. The criminalization of retaliation against a whistleblower is found in section 1107 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) (18 U.S.C. §1513(e)) which applies to not only publicly traded companies, but to "any person," which includes individuals, public and private corporations, and other organizations.

Section 1513 was originally enacted as part of the Victim and Witness Protection Act of 1982. Pub.L. No. 97-121, 96 Stat. 1250. Its intent was to strengthen the existing legal protections for victims and witnesses of federal crimes. S.Rep. 97-532, at 9, as *reprinted in* 1982 U.S.C.C.A.N. 2515, 2515. However, §1513(e) was not enacted until 2002, when it was adopted as part of the Sarbanes-Oxley. Pub.L. No. 107-204, § 1107, entitled "Retaliation against informants." The amendment criminalized retaliation against whistleblowers as follows: "Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both." 18 U.S.C. § 1513(e).

It is important to note that the criminal liability for retaliation applies to a much broader set of potential transgressions than just securities fraud. The law covers disclosures made by a whistleblower relating to any violation under federal law and is not limited to employee reports of criminal violations. In reality, an actual violation of the law is not necessarily needed to protect the whistleblower under §1513(e). As long as the whistleblower made a truthful disclosure about the "possible commission" of any federal offense, the whistleblower is protected. Accordingly, an employer and its employees can be subject to criminal liability if there is retaliation against a whistleblower who reported a possible violation of a non-criminal federal law that was not even violated.

In order to establish a criminal violation it must be proven that: (1) the retaliator knowingly took an action with intent to retaliate; (2) the retaliator harmed the whistleblower; and (3) the retaliation was motivated by the whistleblower's cooperation with law enforcement. Intent can be proven through circumstantial evidence, such as: (1) "the natural consequences likely to flow from the [retaliator's] actions," including fear on behalf of the witness (*United States v. Stoker*, 706 F.3d 643, 646 (5th Cir. 2013)); or (2) the lack of a justifiable reason for the retaliator's actions (*United States v. Jefferson*, 751 F.3d 314, 321 (5th Cir. 2014)). The harm to the whistleblower can be either economic or emotional or even something else. Potential harm

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includes loss of employment, a demotion at work, being disparaged to potential future employers, and even feeling threatened or harassed. The timing of the retaliatory action is sufficient to establish retaliation as the motivation. Therefore, if the alleged retaliation occurred after the retaliator learned of the whistleblower's cooperation, the timing requirement can be established. Accordingly, a conviction under § 1513(e) primarily rests on a finding of retaliatory intent. Courts have upheld convictions under § 1513(e) where there are multiple reasonable inferences that could be drawn from the evidence regarding intent. Convictions are upheld as long as retaliatory intent is a reasonable inference that could be reached by the jury. (*Stoker*, 706 F.3d at 646; *United States v. Camick*, 796 F.3d 1206, 1222 (10th Cir. 2015)).

Adding to the dangers associated with the broad sweeping language of § 1513(e) is that the criminal violation can be used as a predicate act under the civil RICO statute, giving the whistleblower the availability to sue for treble damages. 18 U.S.C. § 1961. Therefore, by retaliating against a whistleblower an individual or company may commit a predicate act of racketeering under RICO.

The risks associated with an accusation of retaliation against a whistleblower can be dire, so just as a defense to the whistleblower's allegations must be developed, protections must be put into place to prevent potential criminal liability. Steps need to be taken immediately to ensure the company and its employees do not retaliate against the whistleblower. Accordingly, no adverse actions relating to the whistleblower should be taken without proper documentation and a review by the general counsel.

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