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WHISTLE-BLOWERS

Companies and Counsel Beware: Companies Cannot Override Employees' Right to Act as Whistle-Blowers Under False Claims Act

BY JEANNE A. MARKEY AND GARY L. AZORSKY

Last fiscal year the federal government recovered a total of $3.8 billion from civil False Claims Act cases, with $2.9 billion attributable to *qui tam* lawsuits, and corporations have taken notice.[1] News reports have recently revealed that some companies have coerced employees to sign confidentiality agreements designed to prevent those employees from pursuing their federal and state rights as whistle-blowers. Employees and their attorneys should know that companies cannot override their statutory rights by corporate decree.

[1] Press Release, U.S. Dept. of Justice, Justice Department Recovers $3.8 Billion From False Claims Act Cases In Fiscal Year 2013 (Dec. 20, 2013), *available at* http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html.

The statements and opinions contained in this article do not, and are not intended to, convey legal advice or suggest a legal outcome to any specific set of facts. The Whistleblower/False Claims Act practice group of Cohen Milstein Sellers & Toll PLLC is experienced in all aspects of False Claims Act law, including employment-related issues that commonly arise in whistleblower cases.

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The False Claims Act

The False Claims Act ("FCA") was enacted in 1863, in response to fraudulent practices of private defense vendors during the Civil War.[2] Since its inception, it has relied on private individuals to come forward and "blow the whistle" on corporations and other entities that defraud the government of public funds. Through *qui tam* provisions, individuals may bring federal lawsuits—and state lawsuits in the 29 states that have enacted versions of the FCA—in the name of the government, which may then proceed to prosecute the case. Significantly, these cases are filed "under seal," which means that only the government, the whistle-blower and his or her attorneys are aware the lawsuit has been filed. The seal mechanism gives the government time to investigate the allegations in the case before the existence of the lawsuit is disclosed to the defendant. If the government ultimately recovers money from the lawsuit, the *qui tam* whistle-blower (the "relator") stands to receive up to 30 percent of the total recovery, which includes treble (3x) damages.

Congress recognized that employees may rightly fear retaliation from their employer, which could dissuade them from becoming a whistle-blower. Accordingly, the FCA contains substantial anti-retaliation provisions that protect individuals from adverse action by their employers in retaliation for disclosing fraud to the government. Specifically, employees are entitled to monetary damages if they are "discharged, demoted, suspended, threatened, harassed, or in any other manner discrimi-

[2] 31 U.S.C. § 3729 *et seq.*

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nated against in the terms and conditions of employment'' because they exercised their rights under the FCA.[3]

Recent Reports of Companies Attempting to Impose Confidentiality Restrictions on Employee Whistle-Blowers

It was recently disclosed that Kellogg Brown & Root Services Inc. (''KBR''), one of the nation's largest defense contractors, is requiring employees to sign ''confidentiality agreements'' that prohibit them from speaking to *anyone* about allegations of fraud, including the government.[4] Indeed, even the agreements themselves were a secret until a KBR vice president was deposed in an FCA lawsuit alleging that KBR inflated the amounts it charged to the government to provide services on U.S. military bases.

According to published sources, KBR required an employee who wished to report instances of fraud to sign a statement that purported to (1) prohibit employees from discussing the ''subject matter'' of their fraud allegations with anyone absent ''specific advance authorization'' from KBR lawyers; (2) warn employees that ''unauthorized disclosure'' of this information could cause ''irreparable harm'' to KBR; and (3) threaten employees with ''disciplinary action up to and including termination of employment'' for violating its provisions.[5]

When asked about the purpose of these confidentiality statements, a KBR vice president of litigation responded that although KBR employees are encouraged to report potential wrongdoing, the company would decide if the allegations were supported by evidence and only then forward them to the relevant authorities. Counsel for the whistle-blower has reported this corporate practice to the U.S. Department of Justice and the Securities and Exchange Commission.[6]

KBR does not appear to be the only company attempting to restrict its employees from exercising their statutory rights to report and bring lawsuits to redress fraud against the government. It also has been reported that International Relief and Development (''IRD'') has required as part of termination agreements with former employees that they will not make ''any derogatory, disparaging, negative, critical or defamatory statements'' about the company to anyone, including government officials.[7]

The IRD agreement also explicitly prohibits former employees from filing any lawsuit against the company and contains broad releases of company liability. Under the ''Consequences of Breach'' section, the agreement specifies that if former employees violate the agreement, they will not only forfeit all their past and future payments under the agreement, but also be subject to damages, injunctive relief and other remedies.

Courts Have Invalidated Employment ''Agreements'' That Would Impede an Employee From Exercising His or Her Rights Under the FCA

Fortunately, courts have acknowledged the strong public policy in favor of encouraging employees to exercise their rights as whistle-blowers under the FCA and its state law counterparts. Although companies may enforce certain confidentiality or non-disclosure agreements in other contexts (prohibiting the disclosure of trade secrets to competitors, for example), companies may not frustrate the goals of the FCA by corporate policy or terms of employment.

The U.S. Supreme Court held in *Town of Newton v. Rumery* that a ''promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.''[8] In *U.S. ex rel. Green v. Northrop*, the U.S. Court of Appeals for the Ninth Circuit refused to enforce an employment agreement that would have released the employee's FCA claims against the company because doing so would have impeded the government's policy of encouraging whistle-blowers to file *qui tam* suits that disclose fraud on the government.[9] The court explained: ''It is commonly recognized that the central purpose of the qui tam provisions of the FCA is to set up incentives to supplement government enforcement of the Act by encouraging insiders privy to a fraud on the government to blow the whistle on the crime.''[10]

Where releases are executed before the government is aware of the fraud at issue, they generally will not be enforced because doing so would nullify the government's policy of encouraging employees to come forward with information about fraud.[11] As the Ninth Cir-

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[3] 31 U.S.C. § 3730(h).

[4] Scott Higham, *Lawsuit brings to light secrecy statements required by KBR*, Wash. Post, Feb. 19, 2014, *available at* http://www.washingtonpost.com/world/national-security/lawsuit-brings-to-light-secrecy-statements-required-by-kbr/2014/02/19/6e2a8818-9998-11e3-b88d-f36c07223d88_story.html.

[5] *E.g.*, U.S. *ex rel.* Barko v. Halliburton Co., et al., No. 1:05-CV-1276 (D.D.C. Mar. 6, 2014).

[6] The DOJ investigates and prosecutes FCA cases, and the SEC has promulgated rules that explicitly prohibit companies from standing in the way of their employees' disclosing to the SEC potential legal violations by using confidentiality agreements. *See* 17 C.F.R. § 240.21F-17(a) (noting that no person may impede discussion with the SEC about a potential violation ''including enforcing, or threatening to enforce, a confidentiality agreement.'')

[7] *IRD confidentiality agreement warns against making negative statements*, Wash. Post, May 4, 2014, *available at* http://apps.washingtonpost.com/g/page/world/ird-confidentiality-agreement-warns-against-making-negative-statements/997/.

[8] 480 U.S. 386, 392 (1987).

[9] 59 F.3d 953 (9th Cir. 1995). Courts have enforced releases that were executed after the government was aware of the fraud at issue. *E.g.*, U.S. *ex rel.* Richie v. Lockheed Martin Corp., 558 F.3d 1161 (10th Cir. 2009); U.S. *ex rel.* Radcliffe v. Purdue Pharma L.P., 600 F.3d 319 (4th Cir. 2010). However, releases executed after a FCA complaint is filed are unenforceable because the government must consent to the voluntary dismissal of a pending FCA action. 31 U.S.C. § 3730(b)(1); U.S. *ex rel.* Longhi v. Lithium Power Tech. Inc., 575 F.3d 458, 474 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 2092 (2010).

[10] *Green*, 59 F.3d at 963 (internal quotation marks omitted).

[11] *E.g.*, U.S. *ex rel.* Pogue v. Am. Healthcorp, Inc., No. 3-94-01515, 1995 WL 626514, at *4 (M.D. Tenn. Sept. 14, 1995), *reconsideration granted and order vacated on other grounds*, 914 F. Supp. 1507 (M.D. Tenn. 1996); *see* U.S. *ex rel.* DeCarlo v. Kiewit/AFC Enters., Inc., 937 F. Supp. 1039, 1046 (S.D.N.Y. 1996) (''Moreover, enforcing prefiling qui tam settlements frustrates a second, related purpose of the False Claims Act,

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cuit explained, ''Congress expressed its judgment that sophisticated and widespread fraud that threatens significantly both the federal treasury and our nation's national security only could successfully be combatted by a coordinated effort of both the Government and the citizenry.''[12]

The federal law prohibiting enforcement of contracts against public policy is applicable to the confidentiality agreements used by KBR and others. Where companies would assert contractual provisions to restrict an employee from using his or her statutory rights to disclose fraud to the government, they are unenforceable.[13]However, employees may be held liable for damages under confidentiality agreements if they take from their employer documents or information that are not related to a potential *qui tam* lawsuit.[14]

In addition, because the confidentiality agreements effectively punish an employee for exercising his or her rights, they also may violate the FCA's anti-retaliation provisions. A company cannot negate statutory anti-retaliation protections simply by institutionalizing retaliation as corporate policy and inserting it into a coerced ''confidentiality agreement.''

The U.S. District Court for the District of Columbia has even held that ''[t]here is a constitutional right to inform the government of violations of federal laws–a right which under Article VI supersedes local tort or contract rights and protects the 'informer' from retaliation,'' and noted that the *qui tam* provisions of the FCA are an example of congressional implementation of that right.[15]

Conclusion

Employees have federal and state rights to act as whistle-blowers and share in the recovery their efforts generate for the government. Companies cannot extinguish those rights by pronouncing, through ''confidentiality agreements'' or otherwise, that their employees may not reveal information concerning fraud to the government by means of a qui tam lawsuit.

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namely the deterrence of fraud and the recovery of treasury funds lost to fraud.''); U.S. *ex rel.* Bahrani v. ConAgra Inc., 183 F. Supp. 2d 1272, 1278 (D. Colo. 2002) (''Under these circumstances, the public's interest in providing incentives for Bahrani to disclose fully to the government inside information concerning alleged government fraud was very much in place at the time Bahrani executed the Release. That the government had some knowledge of the alleged fraud does not negate this interest.'').

[12] *Green*, 59 F.3d at 963 (internal citations and quotation marks omitted).

[13] *See* U.S. *ex. rel.* Grandeau v. Cancer Treatment Ctrs. of Am., 350 F. Supp. 2d 765 (2004) (dismissing FCA defendant's counterclaim against relator for breach of confidentiality agreement as against public policy of protecting whistle-blowers); *see also* EEOC v. Astra USA, 94 F.3d 738 (1st Cir. 1996) (refusing to enforce as against public policy a provision in a settlement agreement that prohibited former employee from communicating with the EEOC).

[14] U.S. *ex rel.* Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1062 (9th Cir. 2011) (quoting JDS Uniphase Corp. v. Jennings, 473 F. Supp. 2d 697, 702 (E.D. Va. 2007) (''[E]mployees would feel free to haul away proprietary documents, computers, or hard drives, in contravention of their confidentiality agreements, knowing they could later argue they needed the documents to pursue suits against employers . . . .'')).

[15] Maddox v. Williams, 855 F. Supp. 406, 415, 415 n.32 (D.D.C. 1994).