Whistleblower Cases are Custom Tailored for ADR

By Jeffrey Grubman, Esq.
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Various state and federal statutes exist to protect and compensate employees whose employers retaliate against them after they disclose certain fraudulent practices to the employers or government agencies. These are known as Whistleblower statutes. Employment claims under Whistleblower statutes are a complex and growing area of the law. The number of federal statutes authorizing Whistleblower claims has increased in recent years, and Congress, federal courts and the Department of Labor have all recently enhanced the ability of employees to collect damages under these statutes.

In 2002, Congress included a provision in the Sarbanes-Oxley Act ("SOX"), section 806 of the Act. This whistleblower provision responded to various corporate accounting scandals by enacting protections for employees of publicly-traded companies who were retaliated against after disclosing or complaining about certain frauds by their employers. In the case of *Lawson v FMR* (2014), the United States Supreme Court substantially broadened the number of claims that can be brought under SOX by finding that contractors, subcontractors and agents of public companies can be held liable. Consequently, accountants, auditors and attorneys (among other service providers) are now targets of SOX whistleblower actions. In addition, several recent court decisions have held that protected activity under SOX includes complaints of fraud by an employer's clients or contractors. See, for example, ***Sharkey v J.P. Morgan Chase & Co.*** (S.D.N.Y. 2010)(action against JP Morgan relating to internal complaint of bank fraud, mail fraud and money laundering by JP Morgan client).

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act in response to the role played by the financial industry in the economic crisis of 2008-2009. The Whistleblower provisions within Dodd-Frank strengthened and broadened the rights of employees to seek relief for retaliation by their employers in the following ways: 1) it expressly provides that employees of wholly-owned subsidiaries of public companies are covered employees under section 806 of SOX, an issue on which the Courts had been split before Dodd-Frank; 2) it established new, anti-retaliation provisions for employees who provide information to the SEC about securities law violations, whose claims are not limited to public companies; 3) it established new, anti-retaliation provisions for employees of companies that provide financial services to consumers, whose claims likewise are not limited to public companies; 4) it established Whistleblower

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protections and a bounty incentive program under the Commodity Exchange Act; 5) it expanded the class of individuals protected from retaliation under the False Claims (qui tam) Act, which prohibits fraud on the government and retaliation against individuals who make internal and external complaints about false claims; and 6) it amended SOX to include a right to a trial by jury in federal court cases, an issue on which the courts had been split.

Whistleblower actions typically involve highly sensitive information and serious allegations that companies would prefer to keep out of the public view. Therefore, ADR is ideally designed to address Whistleblower actions. First, a pre-suit mediation can resolve a Whistleblower action before it becomes public in the form of a lawsuit. A recent pre-suit mediation involved a potential Whistleblower action under SOX, Dodd-Frank and a state statute by a still employed executive of a joint venture between two Fortune 500 companies. Although the company strongly rejected both the factual and legal claims asserted by the employee, the company wanted to avoid publicity associated with a Whistleblower lawsuit. The company also wanted to terminate the employee and receive a release in exchange. After more than 12 hours in mediation, the parties reached a completely confidential resolution and avoided a publicly filed lawsuit.

In certain circumstances, it makes sense for the parties to a potential Whistleblower action to resolve the action by binding arbitration. Unlike a lawsuit, an arbitration proceeding is private and confidential. An experienced and fair minded arbitrator or panel of arbitrators with knowledge of employment law and Whistleblower law in particular, can provide all parties concerned with a worthwhile forum to resolve their dispute. In the case of *Van Asdale v International Game Technology,* (9th Cir. 2009), a former in-house attorney filed a SOX Whistleblower action, which the court refused to dismiss on the grounds that attorney-client privileged information could be disclosed. The Court reasoned that the district court could supervise the proceedings to minimize any prejudice to the employer's privileged information. Regardless of the tools utilized by a federal court judge, the likelihood of maintaining the confidentiality of the attorney-client privileged information (and similar confidential information) is greater in a private arbitration proceeding than a lawsuit.

In conclusion, employment attorneys participating in Whistleblower actions should consider the use of ADR processes from the inception of the claim. Retaining a neutral with knowledge and experience with Whistleblower claims can significantly limit the potential negative impact of an already challenging and potentially disruptive situation. ●

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