Two U.S. courts offer whistleblowers conflicting guidance on protections for internal reporting

Sep 26 2012 Gordon Schnell and Marlene Koury

Two recent and conflicting court decisions leave an open question over exactly who is covered by the Dodd-Frank Act whistleblower protections.

Under the recently implemented whistleblower provisions of the Dodd-Frank Act, whistleblowers who report violations of the securities laws are supposed to be protected from being fired. These protections -- which can include reinstatement, double back pay and special damages -- are designed to serve as an incentive for whistleblowers to come forward despite the risk that they will be retaliated against for exposing their employers' wrongdoing.

The two cases involved whistleblowers who reported violations of the Foreign Corrupt Practices Act (FCPA), the statute that makes it illegal for U.S. companies to bribe officials in foreign countries to secure business there. The whistleblowers in both cases only reported the alleged violations internally to their supervisors within their respective companies and not to the SEC. In both cases, the whistleblowers were fired for coming forward.

So, the question before the two courts was whether these whistleblowers were entitled to invoke the whistleblower protections under Dodd-Frank, even though they never reported the alleged wrongdoing to the government. Each court took a different view.

In the case brought in Tennessee, the federal court found that the anti-retaliation protections do apply to FCPA whistleblowers who only report internally. See *Nollner v. Southern Baptist Convention, Inc.*, M.D. Tenn., April 3, 2012. But in June, a federal court in Texas found that merely reporting internally may not be sufficient. The court said you may also need to report to the SEC to invoke the Dodd-Frank protections. See *Asadi v. G.E. Energy (USA)*, S.D. Texas,. June 28, 2012.

The courts never decided the issue because they threw out the whistleblowers' claims for other reasons. But their apparent disagreement on this issue presents an unfortunate development in the ever-evolving state of whistleblower law. If left unresolved, the conflicting messages will compel whistleblowers, regardless of what steps they take within their own company, to report to the SEC as well. Otherwise, they risk being left out in the cold.

The trouble with this predicament is that in some cases, it is better for all involved -- the whistleblower, the offending company and the public – if the whistleblower works with the company to clean up its house without getting the

government (and the press) involved. That is because once the government and press step in, it may be more difficult for the company to acknowledge and remedy the wrongdoing quickly.

It may also force the whistleblower to take a more adverse position against the company and endure greater scrutiny and exposure for coming forward. In fact, one of the biggest concerns that surrounded the passing of the Dodd-Frank whistleblower provisions was that it would undermine companies' internal compliance programs by encouraging whistleblowers to bypass them completely. Some even argued on behalf of a requirement that whistleblowers report internally first before going to the government. Such a precondition to Dodd-Frank coverage was rejected, and the concerns about upending compliance programs have not really been borne out.

Indeed, recent surveys suggest that the vast majority of whistleblowers do not want to report to the government. They would much rather report their concerns internally and try to work within their company to remedy any wrongdoing. One such study, conducted by the Ethics Resource Center and entitled *Inside the Mind of a Whistleblower*, found that only 3 percent of whistleblowers go directly to the government to report the fraud or misconduct they have witnessed.

Instead, they first work within their company to expose and attempt to remedy the wrong. They do this by reporting to their immediate supervisor, or if there is a lack of trust on that front, to someone higher up the chain. It is only after they attempt to work it out internally do the whistleblowers then take their grievances to the government. Even then, it is still only a small number that ever reports to the government -- less than 20 percent of all whistleblowers.

This reinforces the important role these internal programs can play and the appeal they have for potential whistleblowers – that is, when they are administered properly. And it further illustrates the need for whistleblower flexibility and autonomy in deciding what path makes most sense under the particular circumstances. Unfortunately, until this apparent judicial conflict is resolved, or if the *Asadi* court decision becomes the prevailing view, the only logical path for a whistleblower to take will be to go to the government directly, and as soon as possible.

All of this poses an even more potentially problematic consequence: uncertainty. It sends a message to potential whistleblowers to proceed at your own risk. The whole point of the newly enacted Dodd-Frank whistleblower protections (and its rewards) is to encourage whistleblowers to step forward in the face of what can be a lengthy, tiresome and truly harrowing experience.

But if there is any uncertainty as to whether a particular whistleblower will be covered by these protections, or if there is an overly rigid and restrictive view of the particular path the whistleblower must take, it will undercut the very incentives that Dodd-Frank was designed to foster. Potential whistleblowers may decide it is just not worth all of the trouble.

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