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20 years of HCCA

How the association came to be, where it has been, and where it is going

an interview with Debbie Troklus

Managing Director, Aegis Compliance and Ethics Center;
Co-founder, Health Care Compliance Association

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by Stephen E. Fox and Katherine Kelly Valent

No good deed goes unpunished: Document preservation notice may violate SOX

» An expectation of confidentiality protects the identity of a whistleblower.

» An employer commits an adverse action when it discloses an employee's identity to co-workers as the person who made an anonymous complaint to SEC.

» An adverse action includes any action that might dissuade a reasonable worker from engaging in protected conduct.

» An employee is not required to show that the employer acted with wrongful motive by disclosing the whistleblower's identity.

» Non-economic damages are available to an employee for emotional distress and reputational harm under the Sarbanes-Oxley Act of 2002.

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When a healthcare company is informed of a potential or pending legal proceeding, it is imperative to direct employees to preserve documents that might be relevant to the dispute. However, when the proceeding involves a whistleblower, the company should be extremely careful not to disclose the identity of that whistleblower in the preservation notice. In late 2014, a federal appellate court chastised Halliburton for doing just that—issuing a litigation hold letter that disclosed a whistleblower's identity to his co-workers.[1] The Fifth Circuit Court found that the disclosure of the employee's identity was an adverse action under the Sarbanes-Oxley Act of 2002 (SOX). The Court also confirmed that non-economic damages for emotional distress are available under SOX. In light of this decision, employers need to carefully proceed when preparing for and conducting internal investigations, so that a whistleblower's identity is not disclosed to colleagues.

A litigation hold letter gone wrong

Fox

Valent

Anthony Menendez, employed by Halliburton in its Finance and Accounting department, used the company's internal procedures to submit a complaint regarding what he believed were "questionable" accounting practices. Menendez submitted the complaint via his company work e-mail address. He also lodged a complaint with the Securities & Exchange Commission (SEC). During the course of its investigation, the SEC contacted Halliburton and advised the company to retain documents pertinent to the investigation. The company inferred from Menendez's internal complaint that he must have reported his concerns to the SEC. Halliburton's general counsel then sent an e-mail to Menendez's boss, among others, instructing them to retain documents, because "the SEC has opened an inquiry into the allegations of Mr. Menendez." Menendez's boss then forwarded the e-mail to the 15 members of Menendez's working group (including

Menendez) alerting them to the fact that the SEC was conducting an investigation concerning a complaint filed by Menendez. Once his identity as a whistleblower was disclosed, Menendez's colleagues, who he had essentially accused of fraud, began treating him differently, generally refusing to work and associate with him.

Ultimately, the SEC declined to exercise enforcement action against Halliburton. However, Halliburton found itself in litigation with its former employee, Menendez, who filed a lawsuit claiming that Halliburton retaliated against him by exposing his identity as a whistleblower to his colleagues. Halliburton was found liable by the Fifth Circuit because its actions constituted "a materially adverse action" against Menendez.

To succeed with an anti-relation claim under SOX… the employee only has to prove that his protected conduct was a "contributing factor" in the employer's adverse action.

What is a materially adverse action?

The Fifth Circuit found that "a materially adverse action" is an action by an employer that deters a reasonable employee from filing a complaint (i.e., being a whistleblower). The Court found that Menendez had offered more than enough evidence to satisfy this material-adversity standard. First, Menendez's workplace environment required employees to work collaboratively with each other. The Court noted that Halliburton's disclosure of Menendez's complaint and the subsequent official investigation regarding his co-workers' accounting practices would easily create an environment of ostracism. Halliburton's disclosure not only ostracized Menendez, but sent a message to other employees of the potential negative consequences for reporting a complaint. As a result, Halliburton's actions might well dissuade a reasonable employee from whistleblowing.

The contributing factor analysis — Does motive matter?

To succeed with an anti-relation claim under SOX, an employee does not need to prove that his employer had a wrongful motive. Instead, the employee only has to prove that his protected conduct was a "contributing factor" in the employer's adverse action. Halliburton sought to avoid liability by contending it did not intend for Menendez to suffer any negative consequences by sending an e-mail identifying him as a whistleblower. Halliburton also argued that by identifying Menendez in the e-mail, it sought to show him that the company was seeking to address his concerns. Specifically, Halliburton argued that Menendez could not show a "wrongfully motivated" causal connection between his protected activity (making a complaint) and an adverse action (ostracism).

The Court rejected Halliburton's argument and determined that the analysis did not hinge on the company's intent. Menendez did not have to show "wrongful motive" by the company. Regardless of a company's motives, the Court wrote, "personnel actions against employees should quite simply not be based on protected activities such as whistleblowing."

Damages

Are emotional distress damages recoverable under SOX? The Court awarded Menendez $30,000 in emotional distress and reputational

harm damages for Halliburton's disclosure of his identity as the whistleblower. The Fifth Circuit explained:

> It would be an odd result, to say the least, to construe a statute that prohibits certain 'threats' and 'harassment' against employees and purports to afford 'all relief necessary to make the employees whole' to not offer a remedy for the most usual and predictable result of threats and harassment, emotional distress.

Conclusion

An employer that discloses the identity of a whistleblower to coworkers—even inadvertently—commits a materially adverse action (the first step toward a finding of unlawful retaliation), because the action could easily have the consequence of dissuading a reasonable worker from engaging in protected conduct. The disclosure of a whistleblower's identity not only serves as a warning to other employees, but negatively impacts the employee's ability to advance in a work environment that requires collaboration. As such, during an internal investigation conducted by the company's Legal department or senior management staff, the company must be exceedingly careful not to undertake actions that could be characterized as "dissuading a reasonable worker from engaging in protected conduct." To avoid liability, the company should consider the following:

- Companies can be held liable for "outing" a whistleblower's confidential complaint.
- Maintain strict confidentiality regarding any whistleblower claims.
- Limit any disclosure regarding an investigation to a "need-to-know" basis.
- Establish policies for handling investigations to ensure strict confidentiality of employee complaints.
- Inform and train supervisors, human resource professionals, and Legal department personnel on how to handle complaints with required confidentiality.

1. *Halliburton Company v. Administrative Review Board Of the U.S. Dept. of Labor*, No. 13-60323, 39 IER Cases 529 (U.S. Court of Appeals for the Fifth Circuit. November 12, 2014, updated December 29, 2014). Available at http://bit.ly/12LAEwc