Proskauer

Top 10 Whistleblowing and Retaliation Events Of 2021

Law360 on **January 11, 2022**

2021 was another blockbuster year in the whistleblowing and retaliation arena. The U.S. Securities and Exchange Commission Office of the Whistleblower has now issued in excess of $1 billion in whistleblower bounties.

Meanwhile, courts continued to grapple with the parameters of the protections afforded by the whistleblower provisions of the Sarbanes-Oxley, Dodd-Frank and False Claims Acts. This is of critical importance to employers because claims invoking those statutes continue to present notable financial risks and exceptional reputational risks, as they often implicate serious compliance issues.

We also saw important legislative advancements that expanded protections to whistleblowers. In short, this remains an area that in-house counsel and human resources and compliance professionals need to monitor and continue to adapt to.

Here are the top 10 whistleblowing and retaliation events of the past year.

10. Theranos whistleblower testified at Elizabeth Holmes' jury trial.

On Sept. 8, 2021, the highly anticipated criminal trial of former Theranos CEO Elizabeth Holmes began before a jury in the U.S. District Court for the Northern District of California .[1] Federal prosecutors accused Holmes of defrauding investors and duping patients about the efficacy of Theranos' supposedly revolutionary blood testing technology.

The trial featured the testimony of Erika Cheung, a former Theranos lab technician who had blown the whistle regarding the ineffectiveness of Theranos' proprietary devices. While Theranos allegedly said its machines "could run over 200 tests with tiny amounts of blood," Cheung told the jury that

> Theranos could never handle more than 12 types of blood tests on its proprietary Edison machine, and instead ran most tests on third-party machines, including some that it modified to work with smaller blood samples.[2]

Cheung also believed there were problems with quality control tests, and said "the practice of scrapping so-called outlier data to overcome quality-control failures happened frequently during her time at the company."[3]

Cheung resigned after she reported her concerns to Ramesh "Sunny" Balwani, the company's chief operating officer, and to former Secretary of State George Shultz, a member of Theranos' board of directors, and found them to be unreceptive.

Months after she left Theranos, Cheung blew the whistle to a Wall Street Journal journalist. She alleged that this prompted a threatening letter from Theranos' lawyers and she believed she was being followed.

Holmes stunningly acknowledged on the witness stand that "every issue Cheung had raised was correct."[4] Remarkably, Holmes said, "I sure as hell wish we treated her differently and listened to her."[5] And she responded "yes" when asked, "You know today that Ms. Cheung was right, isn't that fair?"[6]

On Jan. 3, 2022, the jury found Holmes guilty on four charges. Interestingly, although the jury ultimately convicted Holmes for defrauding investors, it reportedly did not give much credit to Cheung's testimony because she seemed invested in the outcome, according to an interview with a juror reported in the Wall Street Journal.[7]

This case presents practical lessons for employers. Had Holmes and others at Theranos been receptive to Cheung's complaints, the company would have benefited from listening closely to Cheung's concerns, vetting them carefully and working to resolve them. While Cheung did not lodge a retaliation complaint, taking such steps would have inured to Theranos' benefit if such a claim was advanced.

9. OSHA's whistleblower program was expanded to cover reports of violations of antitrust and anti-money-laundering laws.

On Feb. 19, 2021, the U.S. Department of Labor announced that the Occupational Safety and Health Administration would begin to investigate complaints of whistleblower retaliation under two new whistleblower statutes enacted in the waning days of former President Donald Trump's administration: the Criminal Antitrust Anti-Retaliation Act, or CAARA, and the Anti-Money Laundering Act, or AMLA.[8]

The CAARA prohibits employers from retaliating against whistleblowers for reporting criminal antitrust violations to their superiors or the federal government, or for participating in a criminal antitrust investigation or proceeding.

The AMLA, which includes the most consequential overhaul of the anti-money laundering laws in decades, forbids retaliation against whistleblowers for reporting violations of these laws, or for participating in a related investigation or proceeding.

With these additions, OSHA now enforces the whistleblower provisions of 25 different statutes, including those related to workplace safety and health, as well as those concerning consumer products, food safety, securities, motor vehicle safety and health insurance.

Employers can expect whistleblowers to take advantage of these new protections, and thus would benefit from providing training to employees and managers with respect to whistleblower complaints that implicate CAARA or AMLA violations.

8. The Fifth Circuit affirmed dismissal of a SOX whistleblower claim for lack of an employer-employee relationship.

On Jan. 29, 2021, in Moody v. American National Insurance. Co.,[9] the U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal of a Sarbanes-Oxley Act whistleblower retaliation claim where the plaintiff failed to establish an employer-employee relationship with the defendant.

The plaintiff was the owner and president of an insurance group that contracted with the defendant. He allegedly complained to the defendant's board about the defendant's violations of certain SEC regulations and filed a shareholder derivative suit. As a result, the defendant terminated its contract with the plaintiff's company, and the plaintiff filed suit alleging retaliation under SOX.

The U.S. District Court for the Southern District of Texas granted the defendant's Rule 12(b)(6) motion to dismiss, finding that the plaintiff failed to allege facts showing he was a covered employee of the defendant. It rejected the plaintiff's reliance on the U.S. Supreme Court's 2014 decision in Lawson v. FMR LLC,[10] which held that SOX whistleblower protection extended to employees of contractors and subcontractors serving public companies.

The Fifth Circuit affirmed the dismissal, noting that Lawson made clear that SOX only covers "actions an employer takes against its own employees" and, therefore, "the whistleblower entitled to protection must be an employee of the retaliator."

This decision is noteworthy — and effectively serves to limit employers' exposure to SOX whistleblower retaliation claims — because it rejects an interpretation of Lawson that would greatly expand the definition of a covered employee entitled to protection under SOX.

7. A New York federal court held that SOX whistleblower protections extend to investors, and that a confidentiality agreement impeded investors from whistleblowing.

On July 21, 2021, in SEC v. Collector's Coffee Inc.,[11] the U.S. District Court for the Southern District of New York adopted a magistrate judge's report and recommendation denying the defendant's Rule 12(b)(6) motion to dismiss on the grounds that the SOX whistleblower protections are not limited to employees but also extend to shareholders.

On Nov. 4, 2019, the SEC filed suit against the defendants alleging they attempted to prevent investors from communicating with the SEC in violation of Rule 21F-17, which prohibits company actions that impede individuals from reporting alleged securities law violations to the SEC.

The defendants moved to dismiss, alleging that Rule 21F-17 exceeded the SEC's rulemaking authority because it applies to any person, whereas Section 21F of the Securities Exchange Act only applies to whistleblower-employees. Rejecting this argument, however, the court found that the term "whistleblower" in Section 21F applies to any individual who provides information regarding a securities law violation to the SEC, even outside the employer- employee relationship.

On Nov. 17, 2021, the court granted the SEC's motion for summary judgment, finding that the defendants violated Rule 21F-17 by entering into confidentiality agreements with investors that prevented them from communicating securities laws violations to the SEC, suing to prevent such communications, and advertising those suits to further chill communications to the SEC.

Notably, while the SEC brought multiple enforcement actions pursuant to Rule 21F-17 under former President Barack Obama's administration, this was the first enforcement action of this type at the time under the Trump administration.

Both decisions demonstrate the broad reach of Rule 21F-17 and that companies may be exposed to liability if they are restricting nonemployees, such as shareholders, from bringing securities law violations to the SEC's attention. This case should serve as a reminder that companies must ensure that their agreements and confidentiality provisions include clear carveouts allowing whistleblowing to the SEC.

6. New York vastly expanded its whistleblower statute.

On Oct. 28, 2021, New York Gov. Kathy Hochul signed S.B. S4394A, which dramatically expands New York's whistleblower statute, New York Labor Law Section 740.

Section 740 originally was enacted to protect employees who report a violation of the law that either "creates and presents a substantial and specific danger to the public health or safety, or ... constitutes health care fraud."[12] The amendment broadens the definition of "employees" to include former employees, as well as independent contractors.

It also permits employees to prevail on a Section 740 cause of action if they reasonably believe there has been a violation of a law, rule or regulation that poses a substantial and specific danger to the public health or safety.

Previously, Section 740 required there to be an actual violation of the law. Section 740 also previously required employees to report alleged violations to their employers prior to disclosing them to a public body.

The amendment eliminates that requirement if there is an imminent and serious danger to public health; the employee reasonably believes reporting the alleged violation to the employer will result in destruction of evidence, concealment or harm to the employee; or the employee reasonably believes that their supervisor is already aware of the violation and will not correct it.

The amendment expands the definition of prohibited retaliatory actions and available remedies to include front pay, civil penalties up to $10,000, and punitive damages. The statute of limitations has also been extended from one to two years and employees now have the right to a jury trial.

The amendment, which will go into effect on Jan. 26, 2022, amounts to a significant legislative abridgment of the employment-at-will doctrine in New York. New York employers can expect to see an increase in Section 740 whistleblower retaliation claims in the future.

5. The Sixth Circuit ruled that FCA whistleblower protections extend to post-employment retaliation.

On March 31, 2021, in U.S. v. William Beaumont Hospital,[13] the U.S. Court of Appeals for the Sixth Circuit held that the FCA whistleblower protection provision protects former employees from post-employment retaliation. This was an issue of first impression in that circuit.

The plaintiff was a doctor at a hospital who filed a qui tam action alleging the hospital was paying kickbacks to physicians and physicians' groups in exchange for patient referrals. The plaintiff alleged that, as a result of his complaint, the hospital terminated and maligned him, undermining his employment applications to other institutions.

The U.S. District Court for the Eastern District of Michigan dismissed the plaintiff's FCA retaliation claim as it pertained to any post-termination conduct and certified for interlocutory appeal the question of whether the FCA's anti-retaliation provision applies to such allegations.

A split Sixth Circuit panel vacated the dismissal order, holding that the FCA's anti-retaliation provision does in fact protect former employees from post-employment retaliation. The court did not address whether blacklisting was a form of retaliatory conduct prohibited by the FCA, and remanded that issue to the district court.

This decision from the Sixth Circuit creates a circuit split, as the U.S. Court of Appeals for the Tenth Circuit issued a contradictory decision in 2018 in Potts v. Center for Excellence in Higher Education Inc.,[14] holding that the FCA excludes relief for retaliatory acts occurring after employment. It is conceivable that the U.S. Supreme Court will be asked to resolve the split in the future.

4. An Oregon federal court overturned a $2.4 million jury award on a state whistleblower claim.

On Nov. 5, 2021, in Ivie v. AstraZeneca Pharmaceuticals LP,[15] the U.S. District Court for the District of Oregon granted the defendant's renewed motion for judgment as a matter of law and overturned a jury award of approximately $2.4 million — consisting of $1.8 million for noneconomic damages and $510,423 for economic damages — for violation of Oregon's Whistleblower Protection Law.[16]

The plaintiff was a former executive district sales manager who alleged she was discharged for raising compliance issues about the defendant's marketing strategy with respect to certain pharmaceutical products. The plaintiff filed suit in Oregon, alleging her termination was retaliatory.

On June 22, 2021, following a six-day trial, the jury ruled in the plaintiff's favor on her state law whistleblower claim.

However, in subsequently granting the defendant's motion for judgment as a matter of law, the court held that the Oregon Whistleblower Protection Law did not apply extraterritorially, and the plaintiff failed to introduce any evidence that the underlying facts or individuals at issue in her claim were connected to Oregon.

The court further found that upholding the jury verdict would violate the due process clause of the 14th Amendment because it prohibits the application of a state law that is only casually or slightly related to the litigation. The court held that upholding the jury verdict would violate Oregon's choice of law rules and Utah law should apply to the case.

This decision underscores the importance of a choice of venue when bringing a claim under a state or local whistleblower statute, but the jury verdict itself is still noteworthy.

3. Following a high-profile lawsuit, the SEC is preparing potential revisions to whistleblower program rules.

On Aug. 2, 2021, SEC Chair Gary Gensler announced that he had directed SEC staff to prepare potential revisions to two aspects of the final rule implementing changes to the commission's whistleblower program, which was adopted on Sept. 23, 2020.

Gensler explained that he issued his directive to address concerns that two of the amendments to the program could discourage whistleblowers from coming forward, including one amendment that could potentially preclude the commission from issuing an award "in related enforcement actions brought by other law-enforcement and regulatory authorities if a second, alternative whistleblower award program might also apply to the action" and another that "could be used by a future commission to lower an award because of the size of the award in absolute terms."[17]

Earlier in the year, on Jan. 13, 2021, a New York attorney filed a lawsuit in the U.S. District Court for the District of Columbia alleging that the SEC's final rule violated the Administrative Procedure Act. In Thomas v. SEC,[18] Jordan A. Thomas argued that the agency lacked authority to lower large awards or to deny awards better suited to a different whistleblower program. Shortly after the announcement of the commission's statement, the parties jointly moved to stay the case.

The language of the commission's proposed revisions to the final rule has not yet been released, but the announcement appears to demonstrate the commission's desire to avoid the risk of discouraging whistleblowing.

2. A California federal court dismissed whistleblower claims after trial.

On July 26, 2021, in Botta v. PricewaterhouseCoopers LLP,[19] the U.S. District Court for the Northern District of California entered judgment in favor of the defendant on all claims following a bench trial, including whistleblower retaliation claims under SOX and California law.

The plaintiff was a former auditor who filed a whistleblower retaliation complaint with the SEC in November 2016, alleging that supervisors willingly overlooked accounting errors and internal control deficiencies to retain business. The plaintiff further alleged that in retaliation for his whistleblower complaint, he was removed from client engagements and ultimately discharged in August 2017.

The court found that the plaintiff had not established that the defendant retaliated against him. Specifically, it found that the plaintiff was removed from client engagements for legitimate reasons, including his lack of rapport, bedside manner and sensitivity. It also found that the defendant was justified in discharging the plaintiff because he had violated internal standards by "fabricat[ing] an internal control or lied about doing so."

In addition, the court found that, without additional evidence, the temporal proximity of four months between when the SEC opened an investigation into the plaintiff's complaint and his termination was insufficient to establish a causal link between the two. The defendant's representatives also testified persuasively that they were unaware of the plaintiff's whistleblower complaint.

This decision may make employers more optimistic about their chances of successfully defending against whistleblower claims at trial, and it also demonstrates that temporal proximity alone may not be independently sufficient to establish a whistleblower retaliation claim. It also serves as a reminder to employers to carefully document the reasons for any adverse employment actions.

1. The SEC whistleblower office had a record-breaking year, surpassing $1 billion in bounty awards.

On Nov. 15, 2021, the SEC submitted its whistleblower program annual report to Congress,[20] which declared fiscal year 2021 to be another record-breaking year.

Most notably, the commission made more whistleblower awards in fiscal year 2021 — $564 million to 108 individuals — than in all other prior years combined. On Sept. 15, 2021, the SEC announced two awards totaling approximately $114 million to two whistleblowers whose information and assistance led to successful SEC and related actions.[21]

With the issuance of these awards, the Whistleblower Program has paid out over $1 billion in awards since its inception in 2012. And as of Nov. 15, 2021, the award total stood at over $1.1 billion to 214 individuals.

The commission also confirmed in its annual report that this year it received the largest number of whistleblower tips — over 12,200 — which is about a 76% increase in the number of tips received last year.

Notably, approximately 75% of award recipients in fiscal year 2021 raised their concerns internally prior to reporting to the SEC. This is a decrease from 81% and 85% in fiscal years 2020 and 2019, respectively.

Based on these figures, the number of whistleblower tips to the commission is likely to increase, and it would behoove employers to take steps to increase the likelihood that employees will use their internal reporting mechanisms prior to reporting to the SEC. This includes efforts to ensure employees that retaliation is strictly prohibited.

What's next?

Each of these events will likely have an impact reaching into 2022 and beyond. Some of these decisions may be construed to broaden whistleblower protections, including the Sixth Circuit's ruling that the FCA prohibits post-employment retaliation and the Southern District of New York's decision that Rule 21F-17 extends to nonemployees.

But others narrow such protections, such as the Fifth Circuit's dismissal of a SOX whistleblower claim for lack of an employer-employee relationship.

Meanwhile, the SEC Office of the Whistleblower continues to issue awards of epic proportions, further incentivizing more and more whistleblowers to come forward with information. This trend is likely to continue into 2022.

All of this means that whistleblower disputes and issues are here to stay, and employers have a continued need to strengthen and enhance their compliance programs and encourage employees to lodge reports internally, and promptly, before fraud or other unlawful conduct matures.

Reproduced with permission. Originally published January 2022, "Top 10 Whistleblowing And Retaliation Events Of 2021," Law360.

---

[1] No. 18-cr-00258 (N.D. Cal.).

[2] Sara Randazzo, Elizabeth Holmes Trial: Ex-Employee Says She Was Rebuffed in Attempt to Raise Alarms, Wall St. J., Sept. 15, 2021, https://www.wsj.com/articles/elizabeth- holmes-trial-ex-employee-testifies-theranos-cut-corners-11631720459.

[3] Id.

[4] Ben Popken and Cyrus Farivar, Elizabeth Homes admits whistleblower was right and reporter was 'mishandled,' NBC News, Nov. 30, 2021, https://www.nbcnews.com/business/business-news/elizabeth-holmes-admits-whistleblower-was-right-reporter-was-mishandle-rcna7123.

[5] Id.

[6] Id.

[7] Sara Randazzo, Jury in Elizabeth Holmes Trial Seized on Two "Smoking Guns" to Convict Theranos Founder, Juror Says, Wall St. J., Jan. 6, 2022, https://www.wsj.com/articles/jury- in-elizabeth-holmes-trial-seized-on-two-smoking-guns-to-convict-theranos-founder-juror- says-11641503502.

[8] Occupational Safety and Health Administration, US Department of Labor announces OSHA will investigate complaints of whistleblower retaliation under new antitrust, money laundering laws, February 19, 2021, https://www.osha.gov/news/newsreleases/national/02192021.

[9] Moody v. American National Insurance Co. , No. 20-cv-40462 (5th Cir. Jan. 29, 2021).

[10] Lawson v. FMR LLC , 571 U.S. 429 (2014).

[11] SEC v. Collector's Coffee Inc. , No. 19-cv-4355 (S.D.N.Y. July 21, 2021).

[12] N.Y.L.L. § 740(2).

[13] United States, ex rel. Felten v. William Beaumont Hospital , No. 20-cv-1002 (6th Cir. Mar. 31, 2021).

[14] Potts v. Center for Excellence in Higher Education Inc. , No. 17-cv-1143 (10th Cir. Nov. 6, 2018).

[15] Ivie v. AstraZeneca Pharmaceuticals LP , No. 19-cv-01657-JR (D. Or. Nov. 5, 2021).

[16] ORS § 659A.199(1).

[17] U.S. Securities and Exchange Commission, Statement in Connection with the SEC's Whistleblower Program Aug. 2, 2021, https://www.sec.gov/news/public-statement/gensler- sec-whistleblower-program-2021-08-02.

[18] Jordan A. Thomas v. Securities and Exchange Commission et al., No. 21-cv-108 (D.D.C.).

[19] Botta v. PricewaterhouseCoopers LLP , No. 18-cv-02615 (N.D. Cal. July 26, 2021).

[20] U.S. Securities and Exchange Commission, 2021 Annual Report to Congress Whistleblower Program, Nov. 15, 2021, https://www.sec.gov/files/2021_OW_AR_508.pdf.

[21] https://www.sec.gov/news/press-release/2021-177.

Related Professionals

- **Steven J. Pearlman**
  Partner
- **Pinchos (Pinny) Goldberg**
  Senior Counsel