Proskauer

Top 10 Whistleblowing and Retaliation Events of 2024

Law360 on **December 19, 2024**

Following our annual tradition — which started over a decade ago — we are analyzing the year's 10 most significant whistleblower and retaliation events.

As you'll see, in 2024, actions taken by a range of courts and government regulators changed the whistleblower landscape in a variety of ways that significantly affect employers and whistleblowers alike.

10. A Texas federal court granted an employer's summary judgment motion on a SOX whistleblower's counterclaim.

On Aug. 6, in Architectural Granite & Marble LLC v. Pental, the U.S. District Court for the Northern District of Texas granted an employer's summary judgment motion on a whistleblower's counterclaim under the Sarbanes-Oxley Act.[1]

Quite unlike the typical SOX claim, the employee in this case asserted his retaliation claim defensively, in response to his employer filing suit alleging he breached contractual confidentiality obligations by using proprietary company information to start a competing business.

The court determined that the former employee, Parminder Pental, had failed to establish a genuine issue of material fact regarding the third element of his SOX claim — that he experienced a materially adverse employment action — because the alleged actions, such as exclusion from calls and meetings, fabricated performance issues, and threats of demotion and salary reduction, were not substantiated by competent summary judgment evidence.

The court also found that the claim failed because the company established that it would have taken the same personnel actions in the absence of any protected activity.

This decision underscores that regardless of the procedural posture, a purported SOX whistleblower will need to establish every element of the claim.

9. A New Jersey federal court ordered an attorney to disclose whistleblower communications.

On Oct. 10, in U.S. Securities and Exchange Commission v. Princeton Alternative Funding LLC, the U.S. District Court for the District of New Jersey ordered a retired BigLaw attorney to disclose communications between himself and two whistleblowers who he assisted with reporting an alleged $73 million fraud to the SEC.[2] Follwoing the report, the SEC sued the employer, a credit reporting agency, alleging it made false and misleading statements to investors in raising $73 million for a now-bankrupt fund.

The employer subpoenaed the attorney's communications with the two whistleblowers, one of whom objected based on the attorney-client privilege. In response, the employer asserted that the retainer agreement and advertisements for the attorney's consulting company demonstrated that he represented the whistleblowers as a consultant, and not as legal counsel.

The court ordered the documents to be disclosed without deciding the issue, as the whistleblower withdrew his objection after it emerged that he had forwarded certain communications with his attorney to third parties, thereby waiving privilege.

The case highlights the risk that an opposing party may seek to leverage privileged material in whistleblower litigation if adequate steps are not taken to protect the privilege.

8. The CFTC brought its first action against a company for impeding whistleblower communications.

On June 17, the U.S. Commodity Futures Trading Commission settled charges against a Houston-based commodities trading firm for allegedly violating the Commodity Exchange Act, or CEA, including by requiring employees to agree to nondisclosure obligations that would prevent them from voluntarily communicating with the CFTC or other regulators.[3]

The CFTC's Regulation 165.19(b), implementing Section 23(h)-(j) of the CEA, prohibits an employer from taking "any action to impede an individual from communicating directly with the Commission's staff about a possible violation of the Commodity Exchange Act, including by enforcing, or threatening to enforce, a confidentiality agreement or pre-dispute arbitration agreement with respect to such communications."

The CFTC found that between 2017 and 2020, the firm required employees to sign employment agreements and separation agreements that did not include carveouts expressly permitting communications with the CFTC or law enforcement. The CFTC determined that these agreements were sufficient to create an impediment to reporting, even in the absence of any overt impeding actions by the employer.

As part of the settlement, the firm agreed to pay a $55 million civil penalty and cease violating Regulation 165.19(b). The case signals that the CFTC is now scrutinizing contractual provisions that may be construed to impede whistleblower communications.

7. The CFTC whistleblower program had a record year.

The CFTC whistleblower program reported that in fiscal year 2024, it received a record-breaking 1,744 whistleblower tips and issued 12 awards totaling over $42 million.[4] Its enforcement actions associated with these awards recovered monetary sanctions of approximately $162 million.

Over the same period, the CFTC denied 274 award applications that failed to meet statutory requirements. Since the inception of the CFTC whistleblower program in 2014, the CFTC has issued 53 awards cumulatively totaling nearly $390 million in payments, with associated sanctions reaching over $3.2 billion.

Notable awards from fiscal year 2024 include a $1.2 million award to a whistleblower who initially reported misconduct internally. When the employer failed to take corrective action 120 days from receiving the internal report, the whistleblower then reported to the CFTC. The award marks the program's first award to a compliance officer.

The CFTC also awarded over $1 million to a whistleblower who reported improper trading in the digital asset markets, a noted enforcement priority for the CFTC that comprises nearly 50% of its enforcement docket.

6. The Third Circuit refused to enforce an OSHA-issued preliminary reinstatement order.

On Oct. 15, in Gulden v. Exxon Mobil Corp., the U.S. Court of Appeals for the Third Circuit declined to enforce a preliminary reinstatement order issued by the Occupational Safety and Health Administration while the agency investigated whether the two purported whistleblowers had engaged in protected activity under SOX.[5] The Third Circuit held that the former Exxon employees lost Article III standing after they abandoned the administrative process to challenge their terminations by filing a civil action in federal court.

In October 2022, OSHA ordered the employer to immediately rehire two analysts who alleged that they were discharged in retaliation for leaking information to the media, after news sources reported on similar concerns to those they had raised internally. After their employer refused to rehire them, the analysts sought emergency injunctive relief in federal court to enforce the preliminary reinstatement order.

The U.S. District Court for the District of New Jersey determined that it lacked subject matter jurisdiction to compel compliance with the order, and the analysts appealed. While the appeal was pending, the analysts elected to challenge their terminations through a separate civil action in court, which led an administrative law judge to dismiss their administrative proceedings with OSHA. The employer then moved to dismiss the analysts' Third Circuit appeal on mootness grounds.

The Third Circuit held that by electing to file a separate civil action and causing the dismissal of the underlying administrative proceeding, the purported whistleblowers lost standing and could no longer seek to enforce OSHA's order.

This decision appears to underscore that federal courts are unlikely to enforce preliminary reinstatement orders issued by OSHA and will instead wait until a final order is issued after the completion of the administrative process.

5. The Michigan Supreme Court recognized a public policy cause of action for whistleblowers.

On July 22, in Stegall v. Resource Technology Corp., the Michigan Supreme Court ruled that the remedies provided under Michigan's Occupational Safety and Health Act, or MiOSHA, and the federal Occupational Safety and Health Act are insufficient to address acts of retaliation.[6] Therefore, whistleblowers who face retaliation may pursue a common law claim under state law for violation of public policy.

In this case, the plaintiff, Cleveland Stegall, raised concerns to his supervisors about possible asbestos at a vehicle assembly plant. Stegall also allegedly repeatedly requested that air quality tests be conducted and complained that he did not receive the test results. Subsequently, his shift at the plant was discontinued and his employment was terminated. He sued for retaliation, alleging, among other things, a violation of public policy.

In overturning the dismissal of Stegall's public policy claim, the court noted that a public policy claim was sustainable only where "there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue." The court held that where the applicable statutes (OSHA and MiOSHA) contain antiretaliation provisions, the question is whether the remedies of the underlying statutes are exclusive. If exclusive, the public policy claim is preempted, but if the remedies are cumulative, the claim may proceed.

The court concluded that "the remedies provided in OSHA and MiOSHA are plainly inadequate to provide an employee with sufficient redress," noting that the "30-day limitation, the unfettered discretion granted to the department, and the employee's lack of control over what occurs after a complaint has been filed collectively provide sufficient reason to conclude that the remedies in OSHA and MiOSHA are plainly inadequate."[7] Therefore, the court held that the remedies were merely cumulative, and it permitted Stegall to proceed on his public policy claim, in addition to seeking available statutory remedies.

This decision highlights the complex interplay between state and federal whistleblower protections and common law claims for violation of public policy. Employers should be aware that whistleblower statutes do not always preempt common law causes of action, which may enhance the remedies available to employees alleging retaliation.

4. A Florida federal court found FCA qui tam provisions unconstitutional.

On Sept. 30, a court for the first time ruled that the False Claims Act's qui tam provision is unconstitutional. The qui tam provision allows private individuals, or relators, to sue those who knowingly submit false or fraudulent claims to the federal government, and receive a portion of any recovery.

In U.S. ex rel. Zafirov v. Florida Medical Associates LLC, the U.S. District Court for the Middle District of Florida found that the qui tam provision violates the appointments clause of Article II of the U.S. Constitution, which requires that officers of the U.S. be appointed by the president, the courts or department heads.[8]

The court first noted that qui tam relators exercise significant authority, in that they can initiate enforcement actions that may result in treble damages and statutory penalties, have discretion in how to prosecute the action if the government elects not to intervene, and can potentially obtain judgments that become binding precedent. The court then held that relators occupy a "continuing position" established by law because they possess statutorily defined duties, receive between 15%-25% of a successful judgment, and often prosecute the action for multiple years.

The court's decision is a notable departure from prior rulings that have upheld the constitutionality of the FCA's qui tam provision. The decision, which is currently on appeal to the U.S. Court of Appeals for the Eleventh Circuit, opens the door to similar challenges to the FCA in courts across the U.S., and sets the stage for the U.S. Supreme Court to potentially rule on the permissibility of FCA actions, a key component of fraud enforcement in the U.S.

3. The SEC continued efforts to enforce Rule 21-F-17 — the "do not impede" rule.

In September, the SEC announced the settlement of a series of enforcement actions aimed at violations of Rule 21F-17(a), which prohibits "any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation."

In one such enforcement action, the SEC settled charges with a New Jersey-based financial planning firm and its affiliates that required brokerage customers and clients to sign confidentiality agreements to receive payments intended to compensate for alleged securities law breaches.[9]

According to the SEC, the agreements would have deterred clients from reporting possible securities law violations by restricting communication unless the SEC initiated an inquiry. Certain other agreements required the clients to affirm that they had not previously reported the dispute to any securities regulator and would not do so in the future. The firm consented to a cease-and-desist order and $240,000 in civil penalties.

Also in September, the SEC settled charges with seven public companies that entered into employment, separation and other agreements with employees that waived their rights to receive whistleblower awards.[10] The SEC has consistently maintained that such provisions can impede potential whistleblowers from reporting potential securities law violations. Each of the companies agreed to remediate the violations by revising the relevant agreements and paid civil penalties totaling more than $3 million in the aggregate.

These actions show that the SEC has continued to scrutinize contractual provisions that may be construed to impede whistleblower complaints and thereby violate Rule 21F-17(a). It remains to be seen whether the SEC, under the second Trump administration, will continue these efforts.

2. The SEC whistleblower program continued to issue significant awards.

The SEC issued several substantial whistleblower awards in 2024, demonstrating its continued efforts to incentivize whistleblowers to report securities violations.

In July, the SEC issued an award of more than $37 million to a whistleblower whose internal report led the employer to conduct its own investigation and report its findings to the SEC.[11] The individual continued to provide extensive assistance and contributed to the success of the SEC's enforcement proceeding.

In August, the SEC awarded $98 million to two whistleblowers, one of its largest awards ever.[12] The first individual received $82 million for providing information that prompted investigations by the SEC and another agency, and for providing continued assistance. The second was awarded $16 million for significantly contributing to the enforcement actions.

Also in August, the SEC announced awards to two whistleblowers who contributed to related enforcement actions.[13] The first received $4 million for providing information that initiated the SEC's investigation. The second whistleblower received a larger, $20 million award for providing information and cooperation, which were critical to the success of the SEC's enforcement action and an action by another agency.

The program's ongoing issuance of significant awards underscores its effectiveness.

1. The DOJ launched its pilot whistleblower rewards program.

On March 7, the U.S. Department of Justice announced it would implement a corporate whistleblower awards pilot program to incentivize whistleblowers to report corporate criminal activity to the DOJ by awarding them a portion of the net proceeds from any forfeiture that resulted from their information.[14] The awards, which are not mandatory and are subject to the DOJ's discretion, may comprise up to 30% of the first $100 million forfeited, and 5% of proceeds between $100 million and $500 million forfeited.

To receive an award, the forfeiture must exceed $1 million, and the whistleblower must satisfy several other eligibility criteria, including that they did not meaningfully participate in the criminal activity and did not make any false statements to the DOJ in connection with their submission. The DOJ's pilot program took effect on Aug. 1, and will last for three years before being evaluated by the DOJ for extension or modification.

The pilot program is intended to operate alongside similar whistleblower programs, such as those maintained by the SEC and CFTC, and to qualify for an award from the DOJ, the whistleblower must not be eligible for an award under another U.S. government program, or another statutory whistleblower, qui tam or similar existing program.

In addition, the whistleblower must voluntarily provide original, nonpublic information that pertains to at least one of the following four areas:

- Violations by financial institutions, including with respect to anti-money laundering compliance violations, registration requirements for money transmitting businesses, and fraud or noncompliance with regulators;
- Violations related to foreign corruption and bribery;
- Violations related to bribery or kickbacks to domestic public officials; and
- Violations related to federal health care laws and fraud or misconduct in the health care industry.

The pilot program does not require whistleblowers to report internally before reporting to the DOJ, though it notes that participation in internal compliance systems or reporting may increase the award amount.

Within its first three months, the pilot program received over 200 tips, indicating strong initial engagement. However, it remains to be seen whether it will attain success similar to the whistleblower programs maintained by the SEC and CFTC.

Looking Ahead

The whistleblower field is poised for further developments in 2025 and beyond.

The DOJ's pilot program may become a permanent addition to the spectrum of whistleblower bounty award programs if its initial momentum continues. The Eleventh Circuit's anticipated decision on the constitutionality of the FCA's qui tam provisions may reshape the framework of FCA litigation, while rulings like the Michigan Supreme Court's public policy precedent may inspire other state-level expansions of whistleblower protections.

Meanwhile, the SEC and CFTC are expected to maintain their focus on addressing contractual impediments to whistleblower communications as their programs continue to issue substantial awards.

Employers would be well advised to take a fresh look at the full range of their agreements — including myriad agreements with terms relating to confidentiality — to ensure they do not discourage whistleblower activity. It will also be important to reinforce whistleblower protection policies and codes of conduct, provide robust training at all levels, and thoroughly assess employment actions related to whistleblower activity to ensure they are not retaliatory.

Reproduced with permission. Originally published December 18, 2024, "Top 10 Whistleblowing and Retaliation Events of 2024," Law360.

---

[1] Architectural Granite & Marble, LLC Pental, No. 3:20-cv-295-L (N.D.Tex. Aug. 6, 2024).

[2] SEC Princeton Alternative Funding LLC et al., No. 3:21-cv-12971 (D.N.J.).

[3] https://cftc.gov/PressRoom/PressReleases/8921-24.

[4] Commodity Futures Trading Commission 2024 Annual Report.

[5] Gulden Exxon Mobil Corp., No. 23-1859 (3rd Cir. Oct. 15, 2024).

[6] Stegall Resource Technology Corp., No. 165450 (July 22, 2024).

[7] Id. at *10.

[8] U.S. ex rel. Zafirov v. Florida Medical Associates LLC, No. 8:19-cv-01236 (M.D. Fla. Sept. 30, 2024).

[9] https://sec.gov/newsroom/press-releases/2024-115.

[10] https://sec.gov/newsroom/press-releases/2024-118.

[11] https://sec.gov/newsroom/press-releases/2024-103.

[12] https://sec.gov/newsroom/press-releases/2024-90.

[13] https://sec.gov/newsroom/press-releases/2024-104.

[14] https://justice.gov/criminal/criminal-division-corporate-whistleblower-awards- pilot-program.

Related Professionals

- **Steven J. Pearlman**
  Partner
- **Scott S. Tan**
  Associate