THE TEN THINGS EMPLOYMENT LAWYERS NEED TO KNOW ABOUT THE FALSE CLAIMS ACT

More often than not, when a terminated employee seeks legal advice from an employment lawyer, there are often underlying whistleblower issues that an employment lawyer needs to be aware of in order to fully represent the rights of the employee. These issues may sometimes be obvious, but more often than not they may be latent, and even the seasoned employment lawyer may not be aware of them.

This is especially true when the issues potentially involve the federal False Claims Act ("FCA") – the federal law that empowers whistleblowers to bring a claim on behalf of the federal government for fraud and abuse.

Here, then, are ten key things every employment lawyer needs to know about whistleblower issues as they pertain to the FCA, and the anti-retaliation provision in the FCA (31 U.S.C. §3730(h)):

1. **The False Claims Act protects those who report fraud involving the federal government**. If a terminated employee worked – either directly or indirectly – with a government contractor, and the employee suffered an adverse employment action as a result of reporting fraud, then it is critical to keep in mind that there may be potential claims under the FCA. This is important because the anti-retaliation provisions of the FCA are many times more robust, and plenary, than analogous state employment discrimination laws. Relief may include reinstatement, double back pay, and compensation for any special damages, including litigation costs and reasonable attorneys' fees.
2. **Not every "employee" is protected under the False Claims Act anti-retaliation provision.** The FCA prohibits employers from taking retaliatory action against both employees who file whistleblower actions, as well as those who assist them. And Congress recently amended the law to include "independent contractors." However, compliance officers and other employees who are tasked with investigating fraud internally at the company are not afforded the same protection from retaliation as other employees. The scope and landscape of the FCA whistleblower protection provision is not entirely settled, so employment lawyers need to be aware that different categories of employees will be afforded different levels of protection, and may be required to satisfy different burdens of proof to successfully bring a claim.
3. **And this includes federal employees, who are precluded from the protections of the False Claims Act anti-retaliation provision.** Federal employees cannot initiate a retaliation claim under the FCA. The Civil Service Reform Act establishes the exclusive method for federal employees to institute employment claims against the federal government.
4. **The False Claims Act anti-retaliation provision applies even if no False Claims Act lawsuit is filed**. The FCA protection against retaliation extends to whistleblowers whose allegations could legitimately support a FCA case even if a case is never filed. What constitutes legitimate allegations will turn on the facts and circumstances of each employee's situation, but an employment lawyer counseling a client on this issue needs to be aware that the filing of a lawsuit is not a prerequisite to invoking the whistleblower protections under the FCA.
5. **But the anti-retaliation provision of the False Claims Act never applies to states.** The FCA anti-retaliation provision does not allow an employee to sue her employer under the FCA if the employer is a state (or state instrumentality). Courts have consistently held that the anti-retaliation provision of the FCA cannot be used as an end run around the 11th Amendment because under the FCA the United States, and not the plaintiff-employee, is the real party-in-interest.
6. **Any False Claims Act anti-retaliation claim must be brought within three years**. Prior to the passage of the Dodd-Frank Act, the statute of limitations for an FCA anti-retaliation claim was the analogous state statute of limitations for wrongful discharge actions, which could range from as little as three months to six years. Under the Dodd-Frank Act, Congress amended the FCA to add a statute of limitations period for retaliation claims. The statute of limitations period is now three years

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from the date on which the retaliation occurred. Also of note, any FCA retaliation claim can be brought directly in federal court, and there is no administrative exhaustion requirement.

7. **A False Claims Act retaliation claim may not be timely even if filed within three years**. The timing of filing an FCA retaliation action can be highly significant, aside and apart from the statute of limitations issue. Several courts have held that unless the retaliation claim is filed as part of the original FCA *qui tam* complaint, it will be foreclosed later by virtue of the *res judicata* doctrine. It is critical, then, that employment lawyers be aware that any retaliation claim filed under the FCA must be done simultaneously with the underlying FCA case. It cannot be filed later.

8. **Only the employee can release a False Claims Act anti-retaliation claim, not the government**. The FCA anti-retaliation claim belongs to the employee (not the government), and only the employee can initiate and settle this claim. A release of FCA liability by the government does not release any retaliatory claims the employee may have brought. As such, the employee does not require government approval to settle the anti-retaliation claim(s).

9. **Dismissal of a False Claims Act *qui tam* complaint does not terminate the anti-retaliation claim**. An employee's anti-retaliation claim under the FCA survives even if the underlying FCA *qui tam* complaint is dismissed (either voluntarily by the government or through summary adjudication). A typical example of this is when the employee-plaintiff is not the "original source" for the FCA *qui tam* complaint, but has nevertheless suffered an adverse employment action because of protected whistleblowing activity.

10. **The False Claims Act, and its whistleblower provisions, should not be confused with the American Recovery and Reinvestment Act of 2009 ("ARRA")**. The ARRA authorized nearly $800 billion in federal stimulus spending following the financial crisis of 2007-2008. To safeguard these funds, Congress included in the ARRA significant whistleblower protections. In particular, ARRA prohibits any private employer or state or local government that receives stimulus funds from retaliating against an employee who discloses information that the employee reasonably believes constitutes evidence of an improper use of stimulus funds, including gross mismanagement of an agency contract or grant. It is important not to confuse the ARRA with the FCA, even though both relate to government monies. The ARRA covers only those entities that receive federal stimulus money earmarked under ARRA, and whistleblowers may only invoke the ARRA's anti-retaliation provision if those stimulus funds are at issue; otherwise the FCA will generally apply to fraud and abuse of government funds.

As is evident, representing a whistleblower who may have potential FCA claims poses significant issues and hurdles. It is important for an employment lawyer to appreciate and fully grasp the nuances of the FCA in order to effectively represent the interests of such a client. The Robbins Geller Whistleblower Group, comprised of seasoned whistleblower attorneys, including several former federal prosecutors with years of experience investigating and prosecuting FCA cases, has the depth of knowledge and breadth of experience to help you navigate the potential landmines that an employee faces when seeking redress under the FCA.

If you believe there is a potential FCA issue in a case you are handling, please feel free to contact us.

Robbins Geller Rudman & Dowd LLP