Chapter VI: Employee Rights and Privileges

Summary

Counsel and Coverage Issues

— Consider whether employees require separate counsel in any investigation or litigation involving the company.

— Frame by-laws carefully so as to consider to whom, and under what circumstances it will provide indemnification and advance fees to employees.

— There are restrictions on insured depository institutions limiting their ability to indemnify institution-affiliated parties in connection with bank regulatory proceedings.

Employment Actions

— Be vigilant of the circumstances under which they are prohibited from terminating employees, as well as of limitations on what they can say about an employee without incurring defamation risk.

— Sarbanes Oxley and Dodd-Frank provide protections to whistleblowers who file reports against their employers for violations of the securities laws. Companies should be cautious in how they craft language in employee agreements and how they address whistleblower concerns and should also keep the existence of whistleblowers in mind when considering whether to self-report potential violations.

— Carefully document the proper justifications for an employee's termination and be prepared to defend those justifications in follow-on legal proceedings.

Cross-border Concerns

— Consider cross-border differences in employee rights under local labor laws, privilege laws, data privacy concerns, and whistleblower rules.[1]

[1] For further discussion, *see* Chapter IV: Preserving Legal Privilege, and Chapter V: Data Privacy & Blocking Statutes.

Representation by Counsel of Companies and Employees

When determining whether the same attorney may represent a company and one of its employees, officers or directors, the company's attorney must consider whether its interests may conflict with the employee's interests. Both the prosecuting authorities and rules of professional conduct for attorneys require consideration of such conflicts and potential conflicts of interest, and particular caution is warranted in criminal cases. Under the ABA Model Rules of Professional Conduct, a "concurrent conflict of interest" exists where: "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[2] The New York Rules of Professional Conduct similarly define a conflict as a situation where: "(1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or other personal interests."[3]

If a conflict arises between the interests of the company and those of its employees, the same attorney cannot represent both the company and the individual employee unless: (1) the attorney believes she will be able to provide competent and diligent representation to both the company and the employee; (2) the representation is not prohibited by law; (3) the company and the employee do not assert claims against each other in the proceeding or litigation in which the attorney is representing both entities; and (4) both the company and the employee give informed consent, confirmed in writing.[4]

[2] Model Rules Prof'l Conduct r. 1.7(a) (Am. Bar Ass'n 2018).

[3] Rules Prof'l Conduct r. 1.7(a) (N.Y. State Bar Ass'n 2017).

[4] *See* Rules of Prof'l Conduct r. 1.7(b) (N.Y. State Bar Ass'n 2017); Model Rules of Prof'l Conduct r. 1.7(b) (Am. Bar Ass'n 2018).

PRACTICE TIP:
CONFLICTS OF INTEREST REQUIRING SEPARATE COUNSEL

- The company and employee assert claims against each other in the litigation, for example, if the company brings a cross-claim against the employee in connection with a third-party lawsuit brought against both the company and the employee or the company brings its own lawsuit against the employee based on the same underlying conduct.
- The attorney cannot diligently and competently represent both the company and the employee.
- The representation is prohibited by law.
- One or both parties do not give informed consent to the representation, confirmed in writing.[5]

Under the Model Rules of Professional Conduct, an unrepresented witness who has a conflict with the company may still be interviewed by counsel for the company, however the only advice company counsel is permitted to provide is that the unrepresented witness should secure counsel.[6] Where the company's counsel knows or should know that the organization's interests are adverse to the employee's interests, the company's counsel must explain that they represent the company, and not the employee,[7] and in fact, lawyers representing the company generally should inform the company's employees that they represent the company, and not individual employees (so-called "*Upjohn*" warnings).[8] Lawyers should further inform the employees that the conversation is privileged, but that the privilege belongs to the company, which can waive the privilege at its discretion. The failure to give such a warning creates a risk that the individual mistakenly believes the company lawyer represents her individually, and may prohibit the lawyer from disclosing information obtained in the interview.[9]

[5] Not all jurisdictions require consent to be in writing, but, notably, New York, New Jersey, and California do.

[6] Model Rules of Prof'l Conduct r. 4.3 (Am. Bar Ass'n 2018).

[7] Model Rules of Prof'l Conduct r. 1.13(f) (Am. Bar Ass'n 2018) .

[8] *See Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[9] *See* Chapter IV: Preserving Legal Privilege.

Guidance issued by the Department of Justice ("DOJ") underscores the importance of these issues. The 2015 memorandum written by Deputy Attorney General Sally Yates titled "Individual Accountability for Corporate Wrongdoing" (the "Yates Memo") was written to guide DOJ attorneys when handling corporate matters. It emphasizes individual accountability and incentivizes companies to provide all relevant facts about individual employees involved in misconduct to the DOJ.[10] The Yates Memo has increased the importance of considering issues of separate representation and continually re-evaluating those decisions as a matter progresses.

During government investigations a company should carefully consider whether to obtain separate representation for individual employees. This will depend on a number of factors including: (1) the employee's right to have independent counsel; (2) the fact intensive nature of the inquiry (with counsel more appropriate for complicated matters than for simpler matters); (3) the nature of the conduct being investigated including whether there is a potential for criminal culpability; (4) the company's view of the employee including whether the employee is believed to have committed a crime against the company, or whether he is believed to have engaged in the conduct at issue in connection with the employee's business activities; (5) the need for expedition; and (6) whether external regulatory authorities have already begun to investigate (and the identity of those authorities), or whether the matter is purely internal. Other factors that may also be relevant include:

— For a company seeking cooperation credit, providing independent employee counsel can help to reassure the government that it will be able to obtain any relevant information it seeks from individuals without interference by the company. Individual employees may also be more willing to participate truthfully in interviews if they have their own counsel.

— Joint defense agreements between company and individual counsel must appropriately consider the objectives and stages of the government's investigation, and take care not to educate individual counsel or witnesses in ways that would interfere with the government's investigation.

[10] Deputy Att'y Gen. Sally Q. Yates, *Individual Accountability for Corporate Wrongdoing* at 1(Sep. 9, 2015) http://www.justice.gov/dag/file/769036/download.

As described in further detail in Chapter IV: Preserving Legal Privilege, companies should also be mindful of differences in privilege law in other jurisdictions when considering whether or not to undertake a joint representation with an employee of the company.

Corporate Obligations to Advance Attorney's Fees When Employees Face Legal Trouble

When a company employee requires separate representation in a civil, criminal, administrative, or investigative action, the company often pays for the employee's attorney's fees. In some instances, advancement of fees is required under provisions in its bylaws that mandate the advancement of such costs subject to repayment if it is subsequently determined that the employee is not entitled to be indemnified. In other instances, the company may choose voluntarily to advance attorney's fees. The scope of the right to advancement of attorney's fees is limited to the officer or director's entitlement under the company's advancement provision or bylaws. The bylaws may provide that advancement is subject to a prior good faith requirement, meaning that the employee acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the company, or otherwise limit the right to advancement of expenses.[11] In contrast, bylaws may require the company to advance legal fees regardless of an employee's misconduct related to the underlying claims.[12]

[11] *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 509 (Del. 2005) ("[T]he scope of an advancement proceeding under Section 145(k) of the [Delaware General Corporate Law] is limited to determining 'the issue of entitlement according to the corporation's advancement provisions and not to issues regarding the movant's alleged conduct in the underlying litigation'" (citation omitted)); *see also* 21 Marvin G. Pickholz, et al., *Indemnification and Advancement of Legal Fees*, 21 Sec. Crimes, § 4:23, n.18 (2d ed. 2017)("Advancement is not subject to a prior good faith requirement, unless that provision is specifically provided in the agreement.").

[12] *See, e.g., Miller v. U.S. Foodservice, Inc.*, 405 F. Supp. 2d 607, 618 (D. Md. 2005) ("[A] corporation may advance legal fees and expenses to an officer if the officer promises to repay the legal fees and expenses if the court ultimately does not find that he met the good faith requirement. Hence, while USF may later be entitled to a refund from Miller, nothing in the Delaware statute absolves USF from fulfilling its contractual obligation to pay Miller's reasonable legal fees and expenses as incurred."); *Pearson v. Exide Corp.*, 157 F. Supp. 2d 429, 438 (E.D. Pa. 2001) ("[U]nder the Bylaws, the alleged wrongful or *ultra vires* conduct of Pearson and Gauthier does not excuse Exide from satisfying its requirement to provide advancement of litigation expenses for which the plaintiffs are otherwise entitled."); *Tafeen v. Homestore, Inc.*, No. CIVA. 023-N, 2004 WL 556733 (Del. Ch. Mar. 16, 2004), *aff'd*, 888 A.2d 204 (Del. 2005) (noting that unclean hands related to the employee's actions that formed the basis of the underlying proceeding cannot be considered a defense for barring advancement, but unclean hands by the employee in intentionally sheltering assets before seeking advancement may be such a bar).

When Must a Company Advance Legal Fees For Its Employees in the United States?

In the United States, the largest number of corporations are incorporated under Delaware law, meaning the Delaware General Corporate Law ("DGCL") applies. The DGCL provides for both advancement of fees and indemnification. Advancement of fees refers to the payment of legal fees and expenses during pendency of the action.[13] DGCL section 145(e) allows corporations to provide advance payment of litigation expenses to officers and directors so long as the officer or director signs an undertaking to repay the corporation if she is not ultimately entitled to indemnification.[14] The corporation may advance litigation expenses to former officers or directors or other employees and agents of the corporation as the corporation deems appropriate.[15]

Where a corporation's bylaws are broadly written to require advancement of costs and fees to directors and officers, conditioned only upon the filing of an undertaking to repay such amount if it is determined that the director or officer is not entitled to indemnification, the corporation must advance such fees notwithstanding the permissive language of the DGCL.[16]

DGCL sections 145(a) and (b) give corporations the power to indemnify proceedings "by reason of the fact that the person is or was a director, officer, employee or agent of the corporation." Indemnification requires the ultimate outcome of the case to be decided.

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[13] *See Kliger v. Drucker*, No. 003304/11, 2011 N.Y. Misc. LEXIS 6704, *20, (Sup. Ct. Nassau Cty. Oct. 13, 2011). Indeed, the purpose of advancement is to "provide[] corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings." *Sec. Exch. Comm'n v. FTC Capital Mkts.*, 09 Civ. 4755 (PGG), 2010 U.S. Dist. LEXIS 65417, at *14 (S.D.N.Y. June 29, 2010) (citing *Homestore, Inc. v. Tafeen*, 888 A.2d at 211).

[14] DGCL § 145(e) ("Expenses (including attorneys' fees) incurred by an officer or director of the corporation in defending any civil, criminal, administrative or investigation action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section.").

[15] *Id*. ("Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents of the corporation or by persons serving at the request of the corporation as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or other enterprise may be so paid upon such terms and conditions, if any, as the corporation deems appropriate.").

[16] *Molyneux-Petraglia v. Northbridge Capital Mgmt., Inc.*, 841 N.Y.S.2d 219 (Sup. Ct. N.Y. Cty. Apr. 24, 2007); *see also Reddy v. Electronic Data Sys. Corp.*, No. CIV.A. 19467, 2002 WL 1358761, at *5 (Del. Ch. June 18, 2002) (executive employee was entitled to advancement of litigation expenses under the corporation's bylaws in connection with a criminal suit alleging conspiracy and mail and wire fraud and a related civil suit brought by the corporation during the performance of the employee's official duties as a manager).

Under Delaware law, if there is a nexus or causal connection between any of the underlying proceedings and one's official capacity, those proceedings are "by reason of the fact" that one was a corporate officer, without regard to one's motivation for engaging in that conduct.[17] For example, actions taken by a corporate officer in relation to separate shell companies set up by the corporation for the purpose of facilitating a tax shelter transaction were "by reason of the fact" that the person was a corporate officer.[18] A nexus or causal connection exists where, but for the person's role in the corporation, he or should would not have been involved in the action at issue.[19]

Other states have different indemnification and advancement rules. For example, in New York, New York Business Corporation Law §§722-24 governs the advancement of attorney's fees and costs.[20] In New York, indemnification is not available to a director or officer if a judgment or final adjudication is entered against the director or officer which establishes that: (1) his acts were committed in bad faith, or were the result of active and deliberate dishonesty and were material to the cause of action, or (2) he personally gained a financial profit or other advantage to which he was not legally entitled.[21]

When is an Undertaking Required?

An undertaking is required for advancement of fees and costs. Before the corporation advances attorney's fees and costs for the defense of an action, the individual employee must provide the corporation with an undertaking. An undertaking is an

[17] *Homestore,* 888 A.2d at 214; *Perconti v. Thornton Oil Corp.*, No. Civ .A. 18630–NC, 2002 WL 982419, at *3-4 (Del Ch. May 3, 2002); *Molyneux-Petraglia*, 841 N.Y.S.2d at 2.

[18] *Molyneux-Petraglia*, 841 N.Y.S.2d at 2.

[19] *Id*.

[20] N.Y. Bus. Corp. Law § 722(a) (2018) ("[A] corporation may indemnify any person made, or threatened to be made, a party to an action or proceeding (other than one by or in the right of the corporation to procure a judgment in its favor), whether civil or criminal, including an action by or in the right of any other corporation of any kind . . . which any director or officer of the corporation served in any capacity at the request of the corporation . . . in good faith, for a purpose which he reasonably believed to be in . . . [and] had no reasonable cause to believe that his conduct was unlawful").

[21] *Id*. at § 721 ("The indemnification and advancement of expenses . . . shall not be deemed exclusive of any other rights to which a director or officer seeking indemnification or advancement of expenses may be entitled, whether contained in the certificate of incorporation or the by-laws or, when authorized by such certificate of incorporation or by-laws, (i) a resolution of shareholders, (ii) a resolution of directors, or (iii) an agreement providing for such indemnification, provided that no indemnification may be made to or on behalf of any director or officer if a judgment or other final adjudication adverse to the director or officer establishes that his acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated, or that he personally gained in fact a financial profit or other advantage to which he was not legally entitled."); *see also id*. § 722(c) (indemnification of officers and directors in derivative actions).

unconditional, unsecured promise by the officer or director to repay the advance to the corporation. No deposit, bond, or security is required.[22]

When Is Advancement of Fees Advisable?

Advancement of attorney's fees may help attract capable individuals into corporate service by easing the financial burden of paying personal out-of-pocket expenses involved with investigations and legal proceedings.[23] This "allows corporate officials to defend themselves in legal proceedings, secure in the knowledge that, if vindicated, the corporation will bear the expense of litigation."[24]

Can Advancement of Fees Be Used As Evidence Against the Corporation?

The U.S. government cannot hold advancement of fees to individuals as evidence against a company in a criminal proceeding.[25] In *United States v. Stein*,[26] KPMG was accused of developing, marketing, and implementing abusive tax shelters. Federal prosecutors were investigating potential criminal conduct by employees of KPMG, and KPMG originally adhered to its long-standing policy of paying the attorney's fees of its employees in defending against these accusations. Federal prosecutors, in making the decision on whether to charge KPMG with a crime, adhered to the Thompson Memo, which was issued in 2003 by then Deputy Attorney General Larry Thompson.[27] The Thompson Memo was written to help federal prosecutors decide whether to charge a corporation, rather than or in addition to individuals within

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[22] *See, e.g., Spitzer v. Soundview Health Ctr.*, No. 401432/04, 2005 N.Y. Misc. LEXIS 3249, at *9 (Sup. Ct. N. Y. Cty. Jan. 27, 2005); *see also* DGCL § 145(e).

[23] *Schlossberg v. Schwartz*, 992 N.Y.S.2d 161, at *10 (Sup. Ct. Nassau Cty. May 14, 2014) ("[O]ne of the beneficial purposes behind advancement is to help attract capable individuals into corporate service by easing the burden of litigation-related expenses. In particular, advancement provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings.") (quoting *Ficus Invs., Inc. v. Private Capital Mgmt.*, 61 A.D.3d 1 (1st Dep't 2009) (quotation marks omitted).

[24] *Molyneux-Petraglia*, 841 N.Y.S.2d at 3 (citation omitted); *see also* DGCL § 145(c) ("To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.").

[25] *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008); *see also* Deputy Att'y Gen. Mark Filip, *Principles of Federal Prosecution of Business Organizations* (Aug. 28, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf ("2008 Filip memo").

[26] *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

[27] Deputy Att'y Gen. Larry D. Thompson, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf ("Thompson Memo").

the corporation, with criminal offenses. Under the 2003 Thompson Memo, "the corporation's willingness to identify the culprits within the corporation, including senior executives," was a consideration when determining whether a company will receive cooperation credit.[28] The Thompson Memo noted that "[a] factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents."[29] Thus, under the Thompson Memo, one factor the government took into account in measuring the corporation's overall cooperation was whether the corporation promised to support culpable employees and agents by advancing attorney's fees.

After the government informed KPMG that adherence to its policy of indemnifying attorney's fees would weigh against it when determining whether to prosecute, KPMG informed employees that: (1) it would move forward with paying legal fees only if these employees forfeited their Fifth Amendment right to remain silent in order to fully cooperate with the government investigation, (2) legal representation was not required to speak with investigators, and (3) KPMG would cease paying legal fees if the employee was criminally charged. This led to the denial of legal fees for many employees and the termination of others. The *Stein* court held that the government, through the actions of the prosecutors and the directives within the Thompson Memo, violated the Fifth and Sixth Amendment rights of individual defendant-employees.

In 2008, the Filip Memo, issued by then Deputy Attorney General Mark Filip, outlined what measures a corporate entity must undertake to qualify for "cooperation" credit.[30] The Filip Memo sets out that the government can no longer consider whether a company advanced attorney's fees to employees or entered into a joint defense agreement when deciding whether to charge the company with wrongdoing.[31]

[28] *Id*. at 6.

[29] *Id*. at 7.

[30] *See* 2008 Filip Memo.

[31] Carol A. Poindexter & Norton Rose Fulbright, *Criminal and Civil Liability for Corporations, Officers, and Directors*, Practice Note 6-501-9459, West Practical Law (database updated July 2018).

The Yates Memo mentioned above did not change the DOJ's policy on advancement of attorney's fees. However, because the Yates Memo increased the importance of separate representation for individual employees, corporations, as a result, may be more likely to advance attorney's fees for employees.[32]

When Can the Corporation Claw Back Advanced Fees?

DGCL § 145(e) provides that if the director or officer is deemed not to be entitled to indemnification, the corporation may claw back advanced fees pursuant to an undertaking signed by or on behalf of the director.[33] The corporation must wait until the final disposition of the proceedings to claw back any advanced fees if the director or officer is not entitled to indemnification.[34]

Director and Officer Insurance for Corporate Indemnification Obligations

The goal of D&O insurance is to protect directors and officers from losses suffered as a result of their service to the company.[35] A company may also purchase insurance to cover the amounts it has to indemnify its directors and officers.[36]

A D&O policy typically consists of three potential coverages:

— **Side A coverage:** This coverage indemnifies individual directors and officers for losses for which they are not indemnified by their corporation.

— **Side B coverage:** This coverage reimburses the corporation for amounts that it is lawfully permitted or required to expend in indemnifying its officers and directors for their losses.

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[32] *See* Yates Memo.

[33] *See* DGCL § 145(e) ("Expenses . . . may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section.")

[34] *Bergonzi v. Rite Aid Corp.*, No. Civ. A. 20453-NC, 2003 WL 22407303, at *2 (Del. Ch. Oct. 20, 2003) ("As Bergonzi is entitled to advancement until a final disposition of the proceedings, and as the proceedings have not yet reached a final disposition, Bergonzi has a presently enforceable right to advancement. Advancement is a right that the Supreme Court has recognized as distinct from the right to indemnification." (citation omitted)).

[35] Helen K. Michael, Virginia R. Duke & Kilpatrick Townsend & Stockton LLP, *Directors and Officers Liability Insurance Policies*, Practice Note 2-504-6515, West Practical Law (database updated Feb. 2011).

[36] *Id*.

— **Side C coverage:** This coverage is for the entity itself. It generally covers securities actions and protects the corporation for its own liabilities.[37]

Whistleblower Protections for Employees

U.S. Whistleblower Protections Under the Sarbanes-Oxley Act

Sarbanes-Oxley § 806, 18 U.S.C. 1514A, contains significant whistleblower protections and requires companies to implement controls to identify and prevent fraud. Sarbanes-Oxley's whistleblower protections cover not only federal employees, but also employees of publicly-held companies.

A person who alleges discharge or discrimination by any person in retaliation for blowing the whistle, may seek relief by either: "A) filing a complaint with the Secretary of Labor; or B) if the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States."[38] The district court in which such an action is brought has subject matter jurisdiction, regardless of the amount in controversy. The statute of limitations is 180 days after the date when the violation occurs.[39] Sarbanes-Oxley entitles the employee to relief necessary to be made whole, meaning a successful claim can result in reinstatement and back pay with interest.[40]

U.S. Whistleblower Protections Under Dodd-Frank

Dodd-Frank, 15 U.S.C. § 78u-6, goes beyond Sarbanes-Oxley to provide more expansive protections to statutory whistleblowers.[41] Under Dodd-Frank, a whistleblower is defined as: "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the

[37] Gary Lockwood, *Structure of D&O policies, Law of Corp. Officers & Dir.: Indemn. & Ins.*, § 4.8 (2d ed. 2017).

[38] 18 U.S.C. § 1514A(b)(1) (2018).

[39] 18 U.S.C. § 1514A(b)(2) (2018).

[40] 18 U.S.C. § 1514A(c)(2)(A)-(C) (2018).

[41] Jill L. Rosenberg & Renee B. Phillips, *Whistleblower Claims Under the Dodd-Frank Wall Street Reform and Consumer Protection Act: The New Landscape*, https://www.nysba.org/Sections/Labor_and_Employment/Labor_PDFs/LaborMeetingsAssets/Whistleblower_Claims_Under_Dodd_Frank.html.

Commission, in a manner established, by rule or regulation, by the [Securities and Exchange] Commission."[42]

Dodd-Frank creates a private right of action for anti-retaliation protection.[43] An individual alleging retaliation can file suit directly in federal court; unlike under Sarbanes-Oxley, there is no requirement that an individual first file a complaint with the Secretary of Labor. The statute of limitations is six years after the date when the retaliation occurs or within three years after the date "facts material to the right of action are known or reasonably should have been known by the employee" but not more than "10 years after the date the violation occurs."[44] Under Dodd-Frank, the Securities and Exchange Commission ("SEC" or "Commission") may also initiate a retaliation suit. A successful retaliation claim can result in reinstatement, double back pay, and attorney's fees and costs.[45]

Until recently, courts were divided on whether the scope of Dodd-Frank's anti-retaliation provision exclusively covered whistleblowers who report directly to the SEC or whether it also applied to individuals who only report internally.[46] On February 21, 2018, in *Digital Realty Trust v. Somers*, the Supreme Court held unanimously that Dodd-Frank's anti-retaliation provision applies only to whistleblowers who report their claims to the SEC, and internal reporting alone does not trigger Dodd-Frank's protections against retaliation. The Court's decision may lead to an increase in SEC whistleblower claims because the law is now clear that external reporting is required to take full advantage of Dodd-Frank's whistleblower protections.[47]

The Supreme Court's *Digital Realty* decision does not necessarily change how companies should address internal-reporting practices or whistleblowers, as one

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[42] 15 U.S.C. § 78u-6(a)(6) (2018).

[43] 15 U.S.C. § 78u-6(h)(1)(A) (2018).

[44] 15 U.S.C. § 78u-6(h)(1)(B)(iii) (2018).

[45] 15 U.S.C. § 78u-6(h)(1)(C) (2018).

[46] *Compare Egan v. TradingScreen Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066, at *4 (S.D.N.Y. May 4, 2011) (holding that Dodd-Frank's anti-retaliation provision covers not only whistleblowers who provide information to the SEC, but also individuals whose "disclosures that are required or protected under [Sarbanes-Oxley] . . . the Securities Exchange Act of 1934, [18 U.S.C. § 1513(e)], and any other law, rule, or regulation subject to the jurisdiction of the [SEC]," thus requiring a plaintiff asserting an anti-retaliation claim under Dodd-Frank to show either that the report was made to the Commission, or alternatively, that the report fell into one of the above four categories) (citation omitted), *with Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 625 (5th Cir. 2013) (holding that the Dodd-Frank whistleblower protection provision created a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC). The SEC, in its rules, took the same position as the *Egan* court. 17 C.F.R. § 240.21F-2(a) (2018), 17 C.F.R. § 249.1801 (2018); *see also Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 153 (2d Cir. 2015).

[47] *Somers v. Dig. Realty Tr.*, 850 F.3d 1045 (9th Cir. 2017), *rev'd*, 138 S. Ct. 767 (2018).

never knows if a whistleblower has in fact reported or will report to the SEC, and Sarbanes-Oxley as well as state law provide additional avenues for pursuing retaliation claims even absent an SEC report. Companies are thus well-advised to maintain robust lines of internal reporting and an appropriate system for following up on whistleblower complaints to enable internal resolution before a whistleblower feels compelled to report to the SEC or another federal or state regulator. Companies should strengthen the role of management in facilitating internal reporting, actively encourage employees to report anything they expect could raise a legal or ethical concern, and maintain multiple avenues for internal reporting, including an anonymous hotline for whistleblowing.

Moreover, irrespective of whether a whistleblower reports out to the SEC, the SEC's Division of Enforcement can be expected to scrutinize treatment of that individual and the company's internal response to the allegations as part of any government inquiry into the underlying conduct. Companies should therefore maintain robust anti-retaliation policies that emphasize that intimidation and retaliation against whistleblowers is strictly prohibited and ensure that senior management is well-trained and committed to compliance. Policies should explicitly state that nothing in the policy, or any other corporate policies, shall be construed to restrict employees from reporting to any governmental or regulatory agency. SEC staff may view retaliation, irrespective of whether actionable under Dodd-Frank, as evidence of bad intent.

Dodd-Frank also contains a bounty provision. The bounty provision incentivizes employees to go directly to the SEC, with concerns of violations, rather than first reporting such issues internally. SEC rules, however, urge individuals to report internally.[48] For example, the implementing regulations provide that a whistleblower who reports internally to the company and within 120 days reports the same information to the SEC could still be eligible to be considered a whistleblower under the statute.[49] Additionally, where the employee reports internally and then reports to the SEC, that employee will be eligible for the bounty as an original source of not only the information the employee provided, but also any information that the company

[48] 17 C.F.R. § 240.21F-4(b)(7) (2018).

[49] 17 C.F.R. § 240.21F-4(b)(7) (2018); 17 C.F.R. § 249.1801 (2018).

provides to the SEC, which could entitle the employee to a greater award.[50] The whistleblower's voluntary participation in an entity's internal compliance program is a factor that can increase the amount of the award.[51]

To be eligible for a bounty award, a whistleblower must: (a) voluntarily provide the Commission, (b) with original information, (c) that leads to the successful enforcement by the Commission of a federal court or administrative action, (d) in which the Commission obtains monetary sanctions totaling more than $1,000,000.[52]

Since the Commission issued its first award in 2012 through the end of Fiscal Year 2017, the Commission awarded approximately $160 million to 46 whistleblowers.[53] In Fiscal Year 2017, the Commission ordered whistleblower awards of nearly $50 million to 12 individuals, with three of those awards ranking in the Commission's ten largest awards issued to date.[54] This was the largest award issued under the program to date.[55]

U.S. Commodity Futures Trading Commission ("CFTC") Whistleblower Program

The CFTC rules also provide significant protections to whistleblowers. On May 22, 2017, the CFTC amended the rules governing its whistleblower program to significantly strengthen whistleblower protections against retaliation,[56] preclude reliance on confidentiality or arbitration clauses that would prevent employees from reporting to the CFTC, clarify that the CFTC itself may bring enforcement actions for violation of anti-retaliation rules (in addition to private enforcement), revise and clarify the whistleblower eligibility criteria,[57] and amend certain procedural aspects

[50] 17 C.F.R. § 240.21F-4(b)(7) (2018), 17 C.F.R. § 240; 17 C.F.R. § 2249.1801 (2018).

[51] *Id*.

[52] 17 C.F.R. § 240.21F-3(a) (2018).

[53] U.S. Sec. & Exch. Comm'n, *2017 Annual Report to Congress, Whistleblower Program*, at 1, 10, https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf.

[54] *Id*. at 10.

[55] *Id*.

[56] 7 U.S.C. § 26(h)(1)(A) (2018).

[57] Notably, the amended rules (1) no longer require that a whistleblower be the "original source" of the information provided; (2) enable a whistleblower to qualify even if the whistleblower first reports a Commodities Exchange Act violation internally or to another authority, so long as a report is also made directly to the CFTC within 180 days; (3) enable a whistleblower to retain eligibility for an award based on information the whistleblower provided to foreign futures authorities before providing to the CFTC; (4) allow the CFTC to waive its procedural requirements upon a showing of "extraordinary circumstances," which are undefined, to provide added flexibility for whistleblowers of varying sophistication.

of the whistleblower program.[58] The CFTC's amendment aligns its regulations with existing SEC Rule 21F-17, and it is likely that it will be interpreted similarly.

PRACTICE TIP:
BEST PRACTICES TO COMPLY WITH U.S. WHISTLEBLOWER REGULATIONS

- Strengthen the role of management in facilitating internal reporting.
  - For example, require management to take appropriate action to facilitate and promote compliance, hold management accountable for creating a retaliation-free environment, and require managers to report any issues brought to their attention through the appropriate channels.
- Encourage employees to report anything they expect could raise a legal or ethical concern.
- Maintain an anonymous hotline for employees to report potential concerns and ensure the hotline is well-publicized and easy to access.
- Maintain multiple avenues for internal reporting.
- Ensure the process for escalating concerns is transparent and a reasonable investigation of any whistleblower complaints is undertaken with prompt documentation of those efforts.
- Maintain a robust anti-retaliation policy and emphasize company policies and agreements that intimidation and retaliation against whistleblowers are strictly prohibited, even when the whistleblower's claims seem to lack merit.
- Ensure that senior management is well-trained and committed to compliance.
- Ensure that all internal reporting policies explicitly state that nothing in the policy, or any other corporate policies, shall be construed to restrict employees from reporting to any governmental or regulatory agency.

[58] For example, the existing Whistleblower Award Determination Panel (which was independent of the Division of Enforcement) is being replaced by a Claims Review Staff under the supervision of the Director of the Division of Enforcement and assisted by the Whistleblower Office staff, which it is hoped may provide a more direct route for whistleblower claims to translate into enforcement action.

Drafting Confidentiality and Non-Disclosure Agreements

Following a series of enforcement actions alleging that restrictive language in employment agreements violated Rule 21F-17, recent guidance from the SEC and other U.S. regulators, companies should heed the following best practices when drafting confidentiality and non-disclosure agreements to be signed by employees:

— State explicitly that nothing in any company policy or agreement is intended to restrict or prohibit reporting to government regulators or providing information in connection with a report or investigation.[59]

— Do not attempt to limit the types of information an employee may disclose to government regulators.[60]

— Make clear that current and former employees are not required to advise or seek permission from the company before disclosing information to a government regulator.[61]

— Do not attempt to limit current or former employees' ability to receive a monetary award from a government agency.[62]

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[59] The SEC has stated that it is "reviewing, among other things, compliance manuals, codes of ethics, employment agreements, and severance agreements to determine whether provisions in those documents pertaining to confidentiality of information and reporting of possible securities law violations may raise concerns under Rule 21F-17." Office of Compliance Inspections and Examinations, *Examining Whistleblower Rule Compliance*, (Oct. 24, 2016) ("OCIE Guidance"). The SEC counsels against documents containing provisions that "purport to permit disclosures of confidential information only as required by law, without any exception for voluntary communications with the Commission concerning possible securities laws violations," meaning that such a provision is necessary but not sufficient in itself to notify employees of their whistleblower rights. *Id*. The SEC has also warned against policies that "require an employee to represent that he or she has not assisted in any investigation involving the [company]." *Id*. FINRA and the CFTC provide similar guidance. *See* FINRA Regulatory Notice 14-40 (2014); 17 C.F.R. § 165.19 (2018).

[60] The SEC has warned against provisions that "purport to limit the types of information that an employee may convey to the Commission or other authorities" or that "prohibit any and all disclosures of confidential information, without any exception for voluntary communications with the Commission concerning possible securities laws violations." OCIE Guidance.

[61] The SEC has warned against policies that "require an employee to notify and/or obtain consent from the [company] prior to disclosing confidential information, without any exception for voluntary communications with the Commission concerning possible securities laws violations." *Id*.

[62] The SEC counsels against documents containing provisions that "require departing employees to waive their rights to any individual monetary recovery in connection with reporting information to the government." *Id*. CFTC Rule 165 states that "[a] whistleblower retains eligibility for an award based on information provided by the whistleblower to certain specified persons or authorities . . . prior to the time that the whistleblower provided the information to the Commission." Commodity Futures Trading Comm'n, *Strengthening Anti-Retaliation Protections for Whistleblowers and Enhancing the Award Claims Review Process* (May 22, 2017), https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/wbruleamend_factsheet052217.pdf.

— Ensure that company policies and agreements contain a clearly expressed anti-retaliation policy stating that employees cannot be punished or threatened with punishment in any way for whistleblower activity.[63]

— Ensure that company policies and agreements regarding confidentiality include a provision stating that as provided in 18 U.S.C. § 1833, employees will not be held criminally or civilly liable under any federal or state trade secret law for disclosure of a trade secret that is made: (1) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney, in each case, solely for the purpose of reporting or investigating a suspected violation of law, or (2) in a complaint or other document filed in a lawsuit or proceeding, if such filings are made under seal.[64]

[63] Dodd-Frank provides a private cause of action for whistleblowers who suffer retaliation. Dodd-Frank Act, § 922(a); 15 U.S.C § 78u-6(h)(1)(A). The SEC and CFTC also have the authority to bring an action against an employer who retaliates against a whistleblower. *See* 17 C.F.R. § 240.21F-2(b)(2) (2018); 17 C.F.R. § 165.20 (2018).

[64] The Defend Trade Secrets Act of 2016, 18 U.S.C. § 1833 (2018).

CASE STUDY: NEARLY $15 MILLION AWARDED TO OUSTED GENERAL COUNSEL OF BIO-RAD LABORATORIES, INC. IN WHISTLEBLOWER RETALIATION ACTION

— Bio-Rad Laboratories, Inc.'s ("Bio-Rad") former general counsel sued the company under Sarbanes-Oxley, Dodd-Frank, and California state law, asserting that he was wrongfully terminated in retaliation for investigating and reporting to senior management potential violations of the Foreign Corrupt Practices Act in China. After a three-week trial, the jury awarded the ousted general counsel nearly $11 million in damages and punitive damages, and the parties stipulated to an additional $3.5 million owed to the former general counsel in costs and fees.[65]

Key Takeaways

— The *Wadler* court broadened the scope of potential liability for defendants under Sarbanes-Oxley and Dodd-Frank, finding that corporate directors of public companies can be held individually liable for retaliating against a whistleblower.[66] Absent the parties' agreement to dismiss all claims against individual defendants except Bio-Rad's CEO, other corporate directors could have been held liable.

— Privileged communications between a whistleblower and the company's directors, officers, in-house counsel, and even outside counsel, may be both discoverable and admissible in a whistleblower retaliation action to the extent the whistleblower reasonably believes the communications are necessary to prove his or her claims and defenses. This is particularly significant where the plaintiff is a former general counsel or in-house counsel of the company, positions that are ordinarily precluded from reporting to the SEC as a result of their ethical obligations to their clients, and typically viewed by employees and officers as confidential relationships in which to raise concerns and analyze solutions.[67]

Best Practices in the Wake of *Wadler*

— Ensure that indemnification agreements and D&O liability insurance cover whistleblower actions seeking individual accountability for officers and directors.

— Maintain timely and thorough personnel files, including by conducting regular performance evaluations with written documentation, and record negative performance issues as they occur. If a company decides to terminate an employee who previously voiced concerns of potential misconduct, it is critical that the company has a clear record demonstrating that the discipline is unrelated to the whistleblowing activity.

[65] Jury Verdict, *Wadler v. Bio-Rad Labs., Inc.*,141 F. Supp. 3d 1005 (N.D. Cal. February 7, 2017) (15-cv-02356-JCS), ECF No. 223.

[66] *Wadler v. Bio-Rad Labs., Inc.*, 141 F. Supp. 3d 1005, 1019, 1024 (N.D. Cal. 2015).

[67] *See id.*

U.K. Whistleblowing Regime

U.K. whistleblowing legislation protects a wide range of individuals including, among other things, employees, workers, and agency workers. The protections awarded to such individuals include the right not be subject to any detriment. Additionally, whistleblowers are regarded as being automatically unfairly dismissed if the reason or principle reason for the dismissal is that they blew the whistle.

In order to qualify for protection, a whistleblower must make a "qualifying disclosure" which is a "protected disclosure." A qualifying disclosure requires:

— There must be a disclosure of factual information, either verbally or in writing.

— The disclosure must show that one or more of the following types of wrongdoing has taken place, is taking place, or is likely to take place: (a) a criminal offense; (b) a breach of a legal obligation; (c) a miscarriage of justice; (d) danger to the health and safety of an individual; (e) damage to the environment; and/or (f) a deliberate concealment of information about any of the above.

— The whistleblower must subjectively believe that the wrongdoing has occurred, is occurring, or is likely to occur and his or her belief is objectively reasonable.

— The person making the disclosure must also have a reasonable belief that the disclosure is made in the public interest.[68]

To be protected, the disclosure must be made to specified categories of persons:

— **Internal disclosure:** A qualifying disclosure when made to a person's employer will be protected.

— **External disclosure to "prescribed persons":** A qualifying disclosure may be protected when it is made to "prescribed persons," which include, *inter*

[68] Public Interest Disclosure Act 1998 c. 23 (Eng.). The public interest condition relates only to disclosures made after June 25, 2013. For disclosures made before June 25, 2013, there is no public interest requirement but, instead, a good faith requirement applies.

alia, Her Majesty's Revenue and Customs, the Financial Conduct Authority, and the Prudential Regulation Authority. However, a qualifying disclosure to a prescribed person will only be protected where the whistleblower reasonably believes that the wrongdoing falls within the remit of the prescribed person and the information disclosed and allegation in it are substantially true.

— **Wider disclosure:** A qualifying disclosure made to the press may be protected in limited circumstances.

The U.K. whistleblower protections may be applied extraterritorially under certain conditions including where an employee travels often between offices in the United Kingdom and abroad and the employee's normal work base is in the United Kingdom, and where an employee shows a strong connection to the United Kingdom.[69]

Italian Whistleblower Protections

Italian Law No. 179/2017

Law No. 179/2017, which entered into force on December 29, 2017, requires companies that have adopted formal compliance programs pursuant to Legislative Decree No. 231/2001 ("Decree 231") also to implement a formal whistleblower program. Prior to Law No. 179/2017, only financial services and banking firms were required to implement formal whistleblower programs and protection against retaliation was limited to civil servants who reported the commission of wrongdoing.

A company may shield itself from liability if, among other things, prior to a crime's commission, the company adopts and effectively implements a compliance model designed to prevent crimes of the same kind as the one committed. Under Decree 231, companies are not required to adopt a compliance program, but they are encouraged to do so in order to avoid or at least minimize their liability in the event a crime is committed. Decree 231 sets forth certain requirements for compliance programs; for example, a compliance program must identify the activities that, when performed, may give rise to crimes or facilitate their commission; implement

[69] *See Serco Limited v. Lawson; Botham (FC) v Ministry of Defence; Crofts and others v. Veta Limited and others and one other action,* [2006] UKHL 3 (appeals taken from Eng. and Wales); *Ravat v. Halliburton Manufacturing and Services Ltd*, [2012] UKSC 1 (appeal taken from Scot.).

protocols governing the adoption and execution of decisions and the management of financial resources to prevent the commission of crimes; set forth reporting duties to the supervising body; and have a disciplinary code punishing noncompliance.[70]

Like Decree 231, Law No. 179/2017 does not require companies to adopt a compliance or whistleblower protection program; however, pursuant to the new paragraph 2-*bis* of Article 6, Decree 231, compliance programs shall include a whistleblowing procedure so that officers and employees can report violations of Decree 231. Accordingly, companies that have adopted compliance programs in accordance with Decree 231 should evaluate whether their policies comport with Law No. 179/2017, and companies seeking to implement compliance programs should incorporate whistleblower protections as part of those programs.

Under Law No. 179/2017, a compliance program must:

— Provide for more than one whistleblowing channel and be able to protect whistleblowers' identity, of which at least one has to be computerized.

— Prohibit acts of discrimination or retaliation against whistleblowers.

— Provide disciplinary measures for those who retaliate against a whistleblower and for the whistleblowers who intentionally or with gross negligence file false or unsubstantiated reports of violations.

— Provide formal whistleblower channels to directors, managers, and other subjects acting on behalf of the company or one of its organizational units, and persons subject to the direction or supervision of the above mentioned.

— Technically, a whistleblower program need not be available to self-employed contractors, external consultants, or others. However, as a practical matter, companies should nonetheless consider whether there are good reasons to include such persons within the scope of a whistleblower program.

[70] Article 6 ¶ 2, Decree 231.

— There is no requirement that anonymous whistleblower complaints be entertained, Law No. 179/2017 also requires that companies ensure the confidentiality of a whistleblower's identity to the extent permitted by Italian law.

Law No. 179/2017 also provides protection against retaliation by permitting whistleblowers to raise allegations of retaliatory and discriminatory acts arising from whistleblowing activities to the Senior Labor Inspectorate (*Ispettorato del Lavaro*) personally or through a labor union. In case of disputes concerning disciplinary measures, dismissals, transfers, or demotions imposed after the employee blew the whistle, Law No. 179/2017 provides that the burden of proof shifts, requiring the employer to demonstrate that the measure is based on grounds different from the reporting. The existence of strong anti-retaliation provisions means that companies should not only adopt their own anti-retaliation provisions, but also provide formal training to employees on those policies and to see that they are effectively enforced.

Italian Law No. 154/2014

As described above, the first law introducing whistleblowing procedures in the Italian private sector was Law No. 154/2014, which amended the Consolidated Finance Law (*Testo Unico della Finanza*) and the Consolidated Banking Law (*Testo Unico Bancario*) requiring banks and financial intermediaries to implement mechanisms to report breaches of financial and banking regulations.

Among other things, banks and financial intermediaries must provide:

— Specific and independent channels in order to allow their staff to report violations of banking and financial laws and regulations.

— Protection for employees who report breaches committed within the institution against retaliation, discrimination, or other types of unfair treatment.

— Protection of personal data concerning both the person who reports the breaches and the person who is allegedly responsible for a breach.

Compliance With Italian and European Privacy Law

In addition to the specific requirements of Law No. 179/2017 and predecessor legislation Law No. 154/2014 in the financial sector, whistleblowing procedures must also comply with Italian and European privacy law.

In July 2016, the European Data Protection Supervisor issued *Guidelines on processing personal information within a whistleblowing procedure*, listing detailed recommendations. These guidelines are an invaluable tool for any company wanting to implement a whistleblowing procedure compliant with data protection regulations. Specifically, companies should:

— Collect (and retain) only information which are relevant, adequate, and necessary for the investigation.

— Ensure the confidentiality of the information.

— Inform persons involved in the whistleblowing procedure about the processing of their data and provide such persons with a specific data protection statement as soon as practically possible. However, when this information can jeopardize the investigation, the disclosure can be deferred. Deferral of information should be decided on a case-by-case basis and the reasons for any restriction should be documented.

— Define proportionate conservation periods for the personal information processed within the scope of the whistleblowing procedure depending on the outcome of each case (a shorter retention period for reports that did not lead to an investigation).

— Implement both organizational and technical security measures based on a risk assessment analysis of the whistleblowing procedure, in order to guarantee a lawful and secure processing of personal information.

Companies should also consider how whistleblower allegations will be processed and what information will be provided to the whistleblower in view of the General

Data Protection Regulation ("GDPR").[71] Depending on the circumstances, and the nature of the information a whistleblower provides, the GDPR may limit the way in which whistleblower complaints can be processed.

German and French Whistleblower Protections

Germany and France do not have specific whistleblower protection laws in place. However, when whistleblowing programs imply the processing of personal data, they are subject to data privacy and protection regimes.[72]

Brazilian Whistleblower Protections

Brazil has no specific whistleblower protection in place. However, the Office of the Comptroller General ("CGU") has provided Corporate Integrity Guidelines for Private Companies ("CGU Guidelines") that relate to whistleblower procedures in connection with building strong anti-corruption policies.

The CGU Guidelines were issued to clarify certain anti-corruption measures (the "Integrity Program") emphasized by Law No. 12,846/2013, known as the Anti-Corruption Law or Clean Companies Act, under which a company's adoption of the Integrity Program can be recognized as a mitigating factor for malpractice. Law No. 12,846/2013 establishes that legal entities in Brazil are subject to strict administrative and civil liabilities for offences they commit either in their interest or to their benefit against national and foreign public officials.

The Integrity Program under Law No. 12,846/2013 focuses on equipping companies with anti-corruption measures aimed at preventing, detecting, and providing remedies for harmful acts committed against national and foreign public administrations. Companies with existing compliance programs, i.e. those that have a framework of policies and rules set forth to ensure a company is abiding by government laws and regulations, should work to incorporate anti-corruption measures into their existing programs. In connection with those programs, companies should prepare or revise their code of ethics and conduct, as well as the rules, policies, and procedures to prevent irregularities; develop detection mechanisms or channels for reporting irregularities (alerts or red flags, reporting channels, and mechanisms aimed at

[71] *See* Chapter V: Data Privacy & Blocking Statutes.

[72] *See* Chapter V: Data Privacy & Blocking Statutes.

protecting whistleblowers); and define disciplinary measures in cases of violations and remediation measures.

The CGU Guidelines state that a company with a well-structured Integrity Program should have whistleblowing channels for receiving complaints. Specifically, companies should:

— Evaluate the need to adopt several means for receiving complaints, such as suggestion boxes, a hotline, through the internet, and alternatives to online reporting.

— Establish policies to ensure the protection of the whistleblower, such as the possibility of receiving anonymous complaints and the prohibition to retaliate against whistleblowers.

— Establish confidentiality rules to protect whistleblowers who do not want to be known publicly.

— Provide means for the whistleblower to track the progress of his or her complaint.

— Provide training to senior managers regarding the whistleblower program and procedures.

— Explain the existence and use of whistleblowing channels to employees through the company's code of ethics or conduct, and inform employees that retaliation for whistleblowing is prohibited.[73]

[73] *See* Office of the Comptroller General – CGU, *Corporate Integrity Guidelines for Private Companies* (Sep. 2015).

Employment-based Protections

What Can an Employer Do With Employee Communications?

In the United States, employers regularly monitor employees' work communications. Employment at will governs in all states except Montana, and employees generally consent to monitoring by their employers by signing the company's technology policy, which gives the company ownership over the communications and/or authorization to monitor communications.

Even federal privacy statutes, such as the Electronic Communications Privacy Act ("ECPA"), have explicit exceptions that allow for monitoring.[74] ECPA has a consent exception such that if an employer is a party to or has the consent of a party to the communications, there is no violation of the act.[75] Knowing consent destroys any reasonable expectation of privacy. ECPA also has an "ordinary course of business" exception allowing companies to monitor business-related calls and communications.[76] Lastly, ECPA has a "provider" exception under which an employer who supplies the system being monitored is a "provider" and may monitor the communications.[77]

In Europe, the GDPR governs data protection and privacy for all individuals within the EU and addresses the export of personal data outside the EU.[78]

What To Do When Employees, Whether Current or Former, Invoke Their Fifth Amendment Rights

Although whistleblowers are protected by state and federal whistleblower laws against retaliatory discharge for blowing the whistle, there is generally no protection for an employee who refuses to assist in an internal investigation by exercising his or her Fifth Amendment right against self-incrimination. Two employees of Marsh

[74] 18 U.S.C. § 2510 *et seq.* (2018).

[75] *See* 18 U.S.C. § 2511(2)(d) (2018).

[76] *See* 18 U.S.C. §§ 2510(5)(a); 2511(2)(a)(i) (2018).

[77] *See, e.g., Fraser v. Nationwide Mut. Ins*, 352 F.3d 107, 114-15 (3d Cir. 2003) (holding that employer-operated email system was excepted from Title II of the ECPA).

[78] For further detail on the GDPR, *see* Chapter V: Data Privacy & Blocking Statutes.

& McLennan, an international insurance broker-dealer, faced this issue in *Gilman v. Marsh & McLennan Companies, Inc.*[79] In that case, the Second Circuit held that the insurance broker-dealer's demands that its employees sit for interviews regarding their participation in an alleged criminal bid-rigging scheme was not a state action that infringed on the employees' Fifth Amendment right against self-incrimination. Thus, the broker-dealer was not precluded from firing the employees for cause and denying them severance pay, and the Second Circuit held that the broker-dealer had "good institutional reasons" for requiring the employees to sit for interviews or lose their jobs. The Second Circuit noted "a company is not prohibited from cooperating, and typically has supremely reasonable, independent interests for conducting an internal investigation and for cooperating with a governmental investigation, even when employees suspected of crime end up jettisoned. A rule that deems all such companies to be government actors would be incompatible with corporate governance and modern regulation."[80]

[79] *Gilman v. Marsh & McLennan Companies, Inc.*, 826 F.3d 69, 76 (2d Cir. 2016).

[80] *Id.*