Topics of Discussion

I. Background on Whistleblower Protection
II. Applicability to Nonprofits
III. Cases
IV. Sample Whistleblower Protection Policies
V. Question and Answer
Whistleblower Protection: A Brief History

- Origins of whistleblower laws in the Middle Ages:
  - *Qui tam pro domino rege quam pro se ipso in hac parte sequitur*
  - "He who prosecutes for himself as well as for the King"
- Civil War and the False Claims Act
  - Idea was to incentivize people to come forward and bring to light waste fraud and abuse
- Modern Whistleblower Claims expand beyond the FCA
Modern Application of Whistleblower Laws

- False Claims Act historically was applied to defense contractors; today, much larger share (about half) arise from the healthcare industry.
  - This is especially true in the nonprofit space
- Additional whistleblower laws:
  - Sarbanes-Oxley and Dodd-Frank Wall St. Reform
  - IRS Whistleblower Reward Program
  - 2006 Tax Relief and Healthcare Act to fight Tax Fraud
  - Commodity Exchange Act Whistleblower Program
Modern Application of Whistleblower Laws

- Whistleblower Protections in whistleblower statutory schemes
- False Claims Act: Employees that are wrongfully discharged, demoted, harassed or otherwise discriminated against can be entitled to:
  - Reinstatement
  - Double back pay
  - Compensation for special damages including litigation and attorney’s fees
So How Does Whistleblower Protection Apply to Nonprofits?

- Nonprofits are expected to offer protection to whistleblowers under a variety of whistleblower protection provisions
  - Sarbanes-Oxley whistleblower protection and document retention
  - IRS Form 990
  - California Whistleblower Protection Statute
  - False Claims Act
In 2002, following accounting scandals at Enron and Worldcom, Congress passed the Sarbanes-Oxley Act.

- The Act imposed responsibilities on publicly traded companies to certify the accuracy of reported financial information.
- Law includes a provision making it a crime to take retaliatory action against someone for whistleblowing.

Most of Sarbanes-Oxley is only indirectly relevant to nonprofits, but the Whistleblower Protection provisions apply to for-profit and nonprofit entities alike.
The Form 990 is the primary tool for the IRS to gather information about tax-exempt organizations; seen as a way to encourage extension of the same type of Sarbanes-Oxley oversight to nonprofits.

Part VI relates to Governance, Management and Disclosure of tax-exempt entities; Section B relates to “information about policies not required by the Internal Revenue Code.”

Question 13 asks “Did the organization have a written whistleblower policy?”
IRS Form 990

- Answering “No” does not have a legal consequence, but requiring its disclosure carries important practical considerations:
  - Increased likelihood of IRS audit;
  - Reflects poorly on organization to the public (form 990s are available to the public).
- Indication that IRS expects nonprofits to include whistleblower protection as a part of an overall approach to governance.
California Whistleblower Laws

- California has its own whistleblower protection laws that apply to both for-profit and nonprofit entities.
- The California Labor Code Section 1102.5 prohibits employers from:
  - Making or enforcing any rule preventing an employee from being a whistleblower
  - Retaliating against an employee for being a whistleblower
  - Retaliating against an employee for refusing to participate in an illegal or noncompliant activity
  - Retaliating against an employee for having been a whistleblower in any former employment
Non-Profits and the False Claims Act

- Nonprofits fall under the FCA when they present inaccurate information in the process of obtaining federal funds.
- For a nonprofit that receives federal funding, violations can include the following:
  - Stealing charitable funds
  - Improper accounting practices
  - Billing for work that is not performed to increase government funding
  - Performing services that were not included in the scope of the federal award
FCA Violations at Nonprofits: Banner Health

- Banner Health, a nonprofit based in Phoenix, hired Cecilia Guardiola, a resident nurse, to be “director of clinical documentation” in 2012.
- After several months, Guardiola resigned over what she felt were improper billing procedures related to Medicare.
- Guardiola reported to administrators what she felt were inflated numbers and falsified documents.
FCA Violations at Nonprofits: Banner Health

- Guardiola filed a claim under the False Claims Act detailing her allegations.
- Once she related the claim, the Department of Justice brought suit against Banner Health, and Banner Health ultimately agreed earlier this year to pay an $18 million fine.
FCA Violations at Nonprofits: Columbia University

- In 2016, the U.S. Attorney’s Office for the Southern District of New York announced Columbia University agreed to pay $9.5 million to settle allegations that it had improperly sought excessive cost recoveries for research grants.
- Columbia had applied its on-campus cost rate when seeking reimbursement for NIH grants, even though much of the research took place off campus, leading to much higher reimbursement awards.
- The actions came to light via a private whistleblower lawsuit filed under the False Claims Act.
In 2016, an anonymous whistleblower submitted letters to the Barclays board about a recent executive hire; the whistleblower claimed that he had damaging information about the executive.

Barclays CEO attempts to use the company's Information Security team to identify the author of the letters.

CEO is told to stop while the Board investigates the claims; at the conclusion of the investigation, the CEO renews efforts to identify the whistleblower.
FCA Whistleblower Protection Violations: Barclays

- A Barclays internal investigation reveals that the CEO “honestly, but mistakenly” believed that his actions were lawful.
- Financial Conduct Authority (FCA, the UK anti-corruption organization) fined CEO $870,000; imposed additional oversight on Barclays.
- As of April of this year, the case was still being investigated in the United States.
Whistleblower Policy

- Creation of a written policy is an important aspect of sound governance.
- If there are allegations, having had a written policy in place will also help mitigate some of the damage.
- Sample policy from National Council of Nonprofits touches on:
  - Reporting Responsibility
  - No Retaliation
  - Reporting Procedure
  - Compliance Officer
  - Accounting or auditing matters
  - Confidentiality
  - Handling of reported violations
Questions?

Cindy Lewin
cmwlewin@Venable.com
202.344.4273

Stephen Salsbury
stsalsbury@Venable.com
410.244.7470