

Whistleblower Protection at Nonprofits

October 18, 2018

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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



Sarbanes-Oxley

- 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.



IRS Form 990

- 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.



FCA Whistleblower Protection Violations: Barclays

- 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 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?

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