Acronyms That Can Cost You Money: A Defense Lawyer's Primer On Employment Law - Whistleblowers Protection Act

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PART 3

*Having covered the **Elliott-Larsen Civil Rights Act (ELCRA)** and **Persons With Disabilities Civil Rights Act (PDCRA)** in our last two newsletters, here we review the Whistleblower Protection Act (WPA).*

WPA

Claims under the Whistleblowers Protection Act have become increasingly common. This may be because people can make the claim without exhibiting any of the characteristics at issue in other employment statutes: age is irrelevant; a showing of a disability is not necessary; nor are a person's race, sex, gender or religious beliefs relevant. The potential plaintiff need only claim that he reported some wrongdoing to a public body (he "blew the whistle") and as a result he suffered some adverse employment action.

Protected activity

Employees who engage in "protected activity" are protected by the WPA. Generally speaking, for the purposes of the WPA, "protected activity" means one of two things: First, reporting or being about to report a violation of law or suspected violation of law to a public body; and second, participating in an investigation at the request of a public body or in a court proceeding. So if a township building inspector reports to MIOSHA[1] violations or suspected violations of safety regulations, and then suffers adverse job consequences at the hands of her employer (the Township) as a result, that employee may have a whistleblower claim. And if an employee claims she was fired or had her pay cut because she participated in an EEOC[2] investigation of a race discrimination claim, then a whistleblower claim may arise.

"Report" to a "Public Body"

In order to be protected activity, the report must be to a "public body", a phrase that is broadly interpreted and includes not only governmental agencies outside of the workplace, but also the employee's own governmental employer. Also note that precisely what the employee must report in order to have a whistleblower claim covers a broad range. The employee need not report an *actual* violation of law. The employee also is protected when she reports to a public body that she merely *suspects* someone has violated or is violating the law. The breadth of this statute enhances the possibility for abuse. It is by no means difficult for an employee who is already concerned that his job is at risk to report to a state, county, or local agency, or directly to his employer, that he suspects that someone may be violating some law.

As is the case under other employment statutes, the employer has a defense to a whistleblower claim if it can show that legitimate nondiscriminatory reasons justified the adverse employment action.

RETALIATION

Employers must be careful when taking some adverse employment action against an employee who has previously filed a claim under employment statutes or helped someone else pursue such a claim. These statutes universally make it unlawful for an employer to retaliate against an employee in those circumstances. The conundrum is plain: Must the employer give that employee—who had no sustainable claim to begin with—essentially preferential treatment in order to avoid a retaliation lawsuit?

EXPOSURE

Defense attorneys, insurance adjustors and business owners must assess the exposure faced by the employer should the plaintiff win. The exposure must be assessed in both economic and noneconomic terms.

The economic damages alone can be staggering. Plaintiffs are usually able to "blackboard" large damages claims by simply advising a jury that, for example, the employee is only 40 years old and but for the employer's violation of the law he would have continued to earn his annual salary of at least $50,000 for the next 20 or 30 years. So a starting point for damages could be $1 million - $1.5 million.

Even employees who can blackboard only small amounts, such as a 60 year old part-time building inspector earning only $2,500 per year, can present a costly claim for a reason that motivates plaintiffs' attorneys in every claim brought under the statutes we have been reviewing: The attorney can recover his or her attorney fee from the defendant employer. It is too often the case that the dollar exposure of employment lawsuits is driven more by the potential attorney fee award then by the actual damages at issue.

CONCLUSION

Virtually every article of this nature written by a lawyer ends the same way: "These are difficult and important issues that our law firm is well equipped to address. Please touch base if we can be of any help." This article is no different. Employment statutes are hard to interpret and apply. Spotting the red flags is very important. How to react once the red flags are spotted is crucial. Some employers have well trained HR Personnel to offer front-line advice. Others do not. In all events, advice from a lawyer who specializes in the field hopefully will

eliminate, and certainly reduce, the likelihood of lawsuits. But if the lawsuit cannot be avoided, you need an attorney who specializes in the defense of employment lawsuits to represent you.

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[1] Michigan Occupational Safety and Health Act.

[2] Yet another acronym: Equal Employment Opportunity Commission.