

Risk

When the Whistle Blows: The Increasing Risk of Retaliation Claims

By Joni Mason

Employers are increasingly exposed to the risk of retaliation claims as claimants focus on the whistleblower provisions contained in legislation including anti-discrimination laws, the Sarbanes-Oxley Act (SOX), and the 2009 American Recovery and Reinvestment Act (ARRA), among others.

An Increase in Claims

Charges filed with the U.S. Equal Employment Opportunity Commission rose 23 percent, to 32,690, in the year ending Sept. 30, 2008. Retaliation claims represent more than a *third* of all claims filed with the agency and are expected to steadily increase. Indeed, EEOC officials have publicly stated that eradicating retaliation is the Commission's top priority. Moreover, the Commission has indicated that enforcement of anti-discrimination laws depends upon people coming forward to file complaints. In addition to increased enforcement by the EEOC, the U.S. Supreme Court also has focused on retaliation claims, issuing a number of decisions making it easier for claimants alleging retaliation to prevail. Among them, the Court has lowered the bar of what a claimant must establish to win a retaliation claim and extended the scope of retaliation laws to grant protection to employees who merely respond to internal investigations of discrimination.

Most federal laws relating to workplace rights contain anti-retaliation provisions. For example, retaliation against employees who oppose unlawful employment discrimination is expressly prohibited by Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the

Americans with Disabilities Act. In addition, the Fair Labor Standards Act prohibits retaliation against employees who file claims for unpaid wages, the Occupational Safety and Health Act prohibits reprisals against employees who exercise rights under the statute, and the Family and Medical Leave Act prohibits employers from interfering with an employee's exercise of rights under the Act. Employees can also assert retaliation claims based upon their participation in workers' compensation proceedings.

SOX also prohibits retaliation against an employee who provides information regarding any conduct which the employee reasonably (but not necessarily accurately) believes constitutes mail, wire, bank or securities fraud, or which violates any rule or regulation of the SEC or any provision of federal law relating to fraud against shareholders. While the SOX prohibitions against retaliation clearly apply to companies listed on publicly traded stock exchanges, a recent decision of the Administrative Review Board of the U.S. Department of Labor expands whistleblower liability under SOX to *private entities* engaged in business with publicly traded companies (*Kalkunte v. DVI Financial Services, Inc.*). In this decision, a private company, which had contracted with a publicly traded employer, was found to be subject to SOX's whistleblower provisions because the privately held company acted as an agent of the employer and was able to affect the claimant's employment.

The most recent law to offer broad protection for whistleblowers is the ARRA, enacted by Congress as part of the economic stimulus package. These protec-

tions are designed for the benefit of anyone who furthers ARRA's goal of preventing abuse and mismanagement of funds, safety and health violations and violations of law as related to activities of entities funded by stimulus monies. Of note, this law specifically *prohibits* waivers and releases of rights and remedies in any agreement, including a pre-dispute arbitration agreement.

Lower the Risk of Retaliation Claims

The best way for employers to prepare for, and hopefully reduce, any potential employee lawsuit is to create corporate responsibility standards and programs and effectively communicate such standards and programs to employees of all levels. Every company should have written policies and procedures which include a mission statement, acceptable standards of conduct, anti-harassment/discrimination policies, a code of ethics, and a corporate compliance program.

Employers should strive to create a working environment where employees are encouraged to alert management to potential problems and participate in investigations without fear of retaliation. Ensuring consistent administration of policies and responding appropriately and promptly once a complaint is made are the best ways to prevent retaliation claims. Management should reassure the employee lodging the complaint or participating in the investigation that he or she will suffer no retaliation as a result.

Joni Mason is a senior vice president of Executive Liability at Chartis Insurance (joni.mason@chartisinsurance.com).