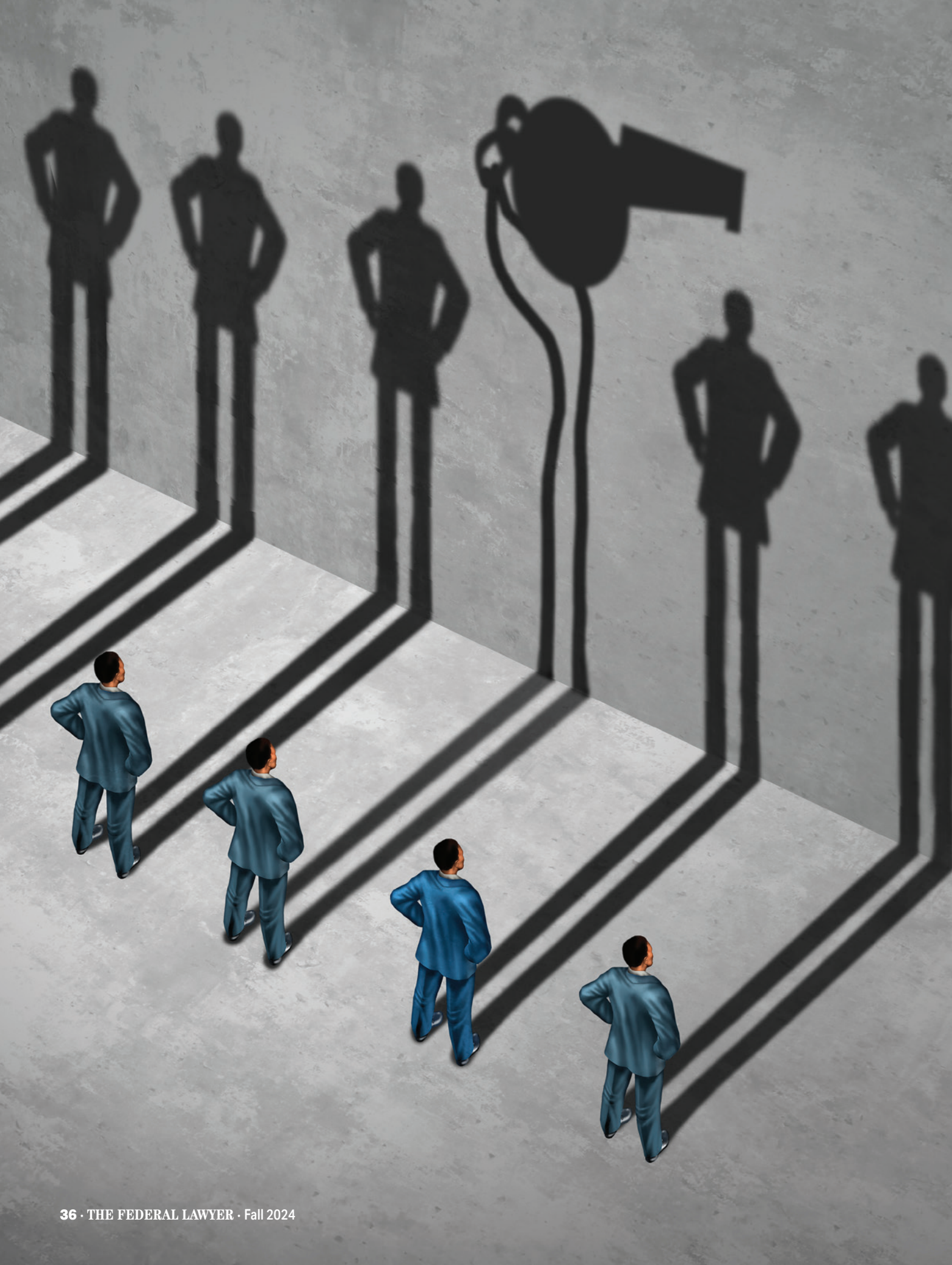

Lessons From Investigations: Practical Guidance for Interacting with Whistleblowers

MEGAN MOCHO AND TAMRA HARRIS

Good corporate governance and effective compliance depends on an entity's ability to identify and correct issues as early as possible. Effective remediation depends on the company's ability to promptly and properly analyze an issue. Gathering perspectives, whether positive or negative, from the individuals involved is a critical aspect of this process.

This is particularly true in False Claims Act, 31 U.S.C. §§ 3729-3733 (FCA) cases, where most cases originate from whistleblowers, referred to as "relators." These cases, known as qui tam cases, are filed under seal in federal district court by the relator in the name of the government.[1] The Department of Justice (DOJ) then evaluates whether to intervene in the case, taking over its prosecution, or to decline intervention, leaving the case to the relator to pursue in court.[2]

Due to their filing under seal, companies do not have access to the qui tam complaint until it is unsealed, which often occurs near or after DOJ's intervention decision. While the facts and circumstances of each case vary, most FCA cases fall into one of two categories: (1) affirmative actions by the company that run afoul of contracts or laws, or (2) inaction by the company that results in false claims being submitted. For example, the former may involve deliberate acts of fraud or actions taken that, while not deliberately fraudulent, materially fail to comply with applicable rules of the industry. The latter may involve inadequate quality control or latent regulatory non-compliances that are permitted to persist due to lack of oversight, inadequate compliance programs, or audit.

The relator typically previews the case to the government by providing documents, consenting to an interview, and/or providing a disclosure statement prior to filing the case. The government evaluates the case covertly for a period of time during which agents may be interviewing third parties, gathering documents and other evidence, conversing with government officials, and conducting data analytics. At some point, agents may attempt to interview current or former employees, the news of which trickles back to the company.

Procedurally, this means the government already has a solidifying perspective of what occurred. The company may at this point receive a subpoena or Civil Investigative Demand (CID), a device which enables DOJ or other government agencies to compel production of documents, witness testimony, and response to interrogatories.[3] The first time counsel for the company is learning about the issue is often tied to service of the CID or subpoena.

And while the CID summarily identifies the nature of DOJ's inquiry and much can be gleaned from the scope and specificity of the CID, counsel is swimming upstream to ascertain the facts and capture relevant testimony. the

Qui tam cases are the primary driver in FCA enforcement activity. According to statistics issued by DOJ, approximately 80 percent of FCA cases in any given year are filed by relators. In the healthcare industry this number is higher—approximately 87 percent—while defense industry cases average around 70 percent.[4] Even before an FCA case is filed, a significant percentage of internal investigations

are sparked by concerns raised by internal employees.

It is therefore no surprise then that one of the most important witnesses in any investigation can be the whistleblower(s). Whether or not the company ultimately agrees with their position, these individuals have a valuable perspective. Their perspective may provide the basis for the government's enforcement activity but more importantly for the long-term health of the company; their perspective should be viewed as a compliance tool. Beyond identifying past or current non-compliances, the process of evaluating a potential issue will help target areas for increased auditing, provide insight into "real" company culture, and highlight areas where increased training is warranted.

This article provides a defense practitioner's perspective on capturing whistleblower perspectives drawn from experience representing companies facing qui tam and other whistleblower cases.

Who are Whistleblowers?

Anyone can be a whistleblower. The FCA is designed to incentivize *anyone* with knowledge of wrongdoing to come forward to protect the federal fisc. In exchange for thei d DOJ recovered over $28 billion in settlements and judgments.[5]

Most whistleblowers are employees, and of those, many are former employees. (Though, as discussed below, most former employees raise concerns before they leave the company). Employees at any level can serve as whistleblowers, from line-level employees all the way up to the c-suite. Company executives are valuable whistleblowers because they often have insight into awareness of the issue by seniormost levels of the company and any parent organizations. They also tend to have access to company financial information, risk analyses, or communications discussing the cost and benefit analyses conducted upon realization of an issue.

However, it is our experience that most employee whistleblowers serve several levels below the c-suite. These individuals typically have a central role to the operation or process that is subject to the issue or are otherwise involved in the operational assessment of a process. They often are the ones who prepare bills or forms, conduct audits, inspect products, prepare the testing, generate reports, or serve as the individual tasked with collating information so the issue can be evaluated by others at the company. These line-level employees tend to have significant involvement in communications around the issue. They are often regular participants at meetings where the issue is discussed and tend to keep meticulous notes of those conversations. They also may have collected quantifiable data.

Compliance officials also can serve as whistleblowers.[6] These individuals have unparalleled access to information that can quantify the pervasiveness of and corporate response to an issue. These individuals can identify internal controls that either failed or were missing from the calculus. And because most compliance organizations are staffed by non-lawyers, sit outside the general counsel's office, and operate independent of instructions from counsel, information to which they have access is not privileged.

That is not to say attorneys have not served as whistleblowers. Counsel can serve as relators; though the situation is fraught for potential waiver of the attorney client privilege and violations of the attorney's ethical obligations.[7]

Even wrongdoers can be whistleblowers. Participation in questionable conduct does not exclude someone from serving as a relator. Someone that actively participated in and directed the conduct can still file an FCA case.[8] In these instances, the FCA permits the judge to reduce the amount of share to which the person is entitled. Only in cases where the individual is convicted for their participation does the FCA preclude recovery.[9] More often, however, whistleblowers view themselves as unwitting, pressured into participating in the conduct at question, or naive to the wrongfulness of the conduct. These people often are seen in emails or corporate chats asking co-participants whether what they are doing is "okay" or lawful or seeking constant approval from higher ups as to their conduct.

Third parties are another source of whistleblowers. Typically, the third party is someone that still has familiarity with the company's operations such as auditors, accountants, customers or consultants. Unrelated third parties that have the ability to data mine or collate information are, with increasing regularity, appearing as relators as well. Though case law cites with favor the service provided by a knowing insider, these third-party entities often can capture and distil sufficient information to solidify their status as a relator.[10] Their suits may be cabined by the FCA's Public Disclosure Bar, which precludes qui tam suits that are based upon information in the public news media and certain federal forums.[11] Corporate data relators serve an important lesson to companies: available data should be evaluated data.

Finally, competitors are also able to serve as whistleblowers. There are no restrictions in the FCA to preclude a corporation from serving as a relator. Competitors have a unique perspective of the conduct at issue due to their industry aperture and often access to former employees of the targeted corporation. Conversations with these entities regularly reveal a desire to have a level playing field by having the conduct stopped, rather than remuneration that flows from serving as a relator.

How do Whistleblowers Communicate Their Concerns?

Organizational culture strongly influences whistleblowing. Organizations with rigid chain of command mentality or that see aggressive personalities in management may discourage employees from raising issues internally.[12] In those instances, employees who find the purported wrongdoing intolerable may report it to external parties viewed as more likely to bring about change. Various government bodies have established hotlines, phone numbers, emails, or other methods of reporting. For example, the U.S. Department of Health and Human Services Office of Inspector General allows whistleblowers to submit health services complaints directly as does the U.S. Department of Defense and most other Offices of Inspector General.[13] Whistleblowers may even choose to report issues to the media or make public disclosure if internal and regulatory channels do not adequately address their concerns.

However, the putative whistleblower likely raised the actual or perceived violations *before* taking this route or filing a qui tam action. Many relators first attempted to bring concerns to light in the months or even years before a CID is ever issued to the company.

For companies with an effective compliance program with internal reporting mechanisms such as an anonymous hotline or compliance reporting website, reports may have come through these formal compliance channels.[14] Reports to these repositories are typically received by the compliance department for investigation and review. These reviews can be and often are effective at capturing the issue. But not infrequently the reporter fails to provide sufficient information to fully evaluate the nature of the complaint or conduct

an effectively scoped review. Or perhaps cases appear benign when viewed individually, but when combined, the problem's pervasiveness coalesces.

Even companies with robust internal reporting programs may overlook the value in retrospective evaluations of previously disclosed compliance concerns, where a pattern of continued reporting can be seen based on an objective historical review of hotline complaints. Still, notwithstanding the availability of an anonymous reporting channel, fewer than expected FCA cases stem from or involve reports to compliance hotlines.

Instead, the whistleblower's concerns are more typically made to other individuals in the company. It is not uncommon to see the whistleblower raise their concern internally more than once, often with an increasing indication of concern at each disclosure. Employee and related-party whistleblowers tend to express their concerns to peers, next-in-line supervisors, or middle management. This method relies on the assumption that management will take appropriate action to address the reported issues. These concerns are regularly made in writing, via email, or chat communications. The issue may be raised passively by the individual, by, for example, asking whether the conduct is compliant or lawful. Or their communications around the issue use terms indicative of concern such as: non-compliant, discrepancy, impropriety, erroneous, or variance. The whistleblower may even be forceful in their expression, calling out the conduct as unlawful, false, illegal, or fraudulent.

It is at this pivotal point that qui tam cases are created.

Reporting Back to the Reporter

Discussions with relators' counsel and whistleblowers indicate the company's response—or more specifically, a lack of response—to the concern tends to drive subsequent legal action.

While some reports may be stifled to avoid disclosure, more often, the report simply stalled at intermediate levels of management. This occurs when individuals receiving the report fail to appreciate the significance of the concern. Supervisors or managers who obtain concerns from employees may mistakenly feel equipped to respond and do not elevate the issue to senior management or legal personnel.

In many cases, actions were taken to investigate the issue but the lack of communication back to the reporting individual caused perception of inaction. Perhaps middle management did evaluate the concern, or even escalated the concerns to senior leadership or legal, but both failed to communicate the results of the evaluation back to the individual.

For hotline complaints, there are times where the anonymity of the report or company policy prevented the individual from receiving results of the investigation. Many of these instances involve situations where the company makes a determination that the individual's concern is unfounded. It is not uncommon for whistleblowers to have a siloed viewpoint of facts or an imperfect understanding of the regulatory scheme at issue. And it is equally common for internal non-legal reviews or evaluations to have a similarly narrow viewpoint of the issue.

Regardless of the root cause or avenue of recourse, the concern that the company failed to take their concern seriously escalates the issue in the mind of the individual. Many whistleblowers file qui tam cases as a last resort, to bring light to the issue in a formal and impactful way. Companies that fail to acknowledge and communicate back to the complainant are missing critical opportunity to make the whistleblower feel heard and avoid unnecessary levels of escalation.

Early detection of issues is always in the best interest of the company. Managers and supervisors would benefit from training on how to effectively listen to employee concerns.[15] This should be coupled with a requirement to report suspected concerns to senior leadership, compliance, and/or legal. Companies similarly should have policies in place for reporting up the chain any unusual external inquiries from auditors, agents, or customers.

The company should always confirm receipt of the information to the reporter. This is an important first step in acknowledging the whistleblower's perspective. Many company compliance programs automatically provide a generic response to the reporter thanking them for the information, indicating the company will review the concern. Personal follow up is recommended where possible. If an investigation is prolonged, regular check-ins to indicate the investigation is still ongoing may be prudent, taking into account the nature of the complaint and complainant.

After conclusion of an investigation, always report back to the reporter. Many companies decide that reporters will not receive results of its investigation or a simple notice that the investigation has concluded. This should be communicated to the employee in advance of the investigation's conclusion to set expectations.

The stonewalled approach, however, may fuel the perception that no action is being taken. For example, in the scenario where the company thoroughly vets the employee complaint but determines there is no compliance violation, if the reporting employee receives no feedback, they see status quo and may assume their complaints were well founded but simply ignored. Even if the employee is informed in advance that they will not be read into the conclusions, the lack of insight into the matter is frustrating for complainants.

Some level of disclosure to the complaining party may better serve the company in the long run. The company should evaluate on a case-by-case basis whether sharing the conclusions of its investigation—or at least sharing that the concern was thoroughly vetted and why there was no concern—is appropriate. In doing so, the company will need to evaluate the nature of the complaint, complainant, and potential risk.

For example, if the issue is born of a misunderstanding of company policy or the law, retraining all affected employees is appropriate. If it appears that certain employees lack insight into facts that are relevant to an appropriate understanding, a discussion about those facts may be in order.

If the company verifies existence of a violation of company policy or law, an appropriate response should not involve silence on the issue. Effective remediation will require corrective action. Depending on the specific risk profile of the situation, the company will need some level of transparency into the determination and proposed remedial actions. Disclosures should not contain privileged information or otherwise compromise the integrity of the investigation by breaching confidentiality of witness testimony; however, transparency helps curb the impression that no action was taken. It also ensures that all employees, not just the complainant, have equal understanding as to the company's expectations and employee's obligations to comply with law and policy.

There may be certain circumstances calling for follow up with the complainant or other witnesses at regular intervals in the months following the investigation. The company uses this

opportunity to verify that remedial actions have corrected the issue, confirm no retaliation has occurred, and to demonstrate its compliance and culture.

Capturing the Whistleblower's Perspective

Internal investigations may provide an opportunity to interview a reporting individual. The complainant is typically interviewed first in an investigation, but there may be cause to delay interviewing the reporting individual first. For example, where a report is very detailed with dates, names and/or documentation, interviewing the whistleblower after speaking with other cognizant employees may make sense. Counsel conducting internal investigations should expect to speak to the whistleblower more than once, but also be prepared to have only one shot at interviewing the individual. The first interview is therefore the most critical.

Conducting effective investigations depends on creating connections: connections between assumptions and fact, connections between people and facts, connections between facts and the law. Making these connections is dependent on one's ability to first make a human connection to the people involved. For whistleblowers, and any witness really, inquires must demonstrate the questioner's understanding of the witness perspective and professional world.

Though investigations must be promptly initiated in earnest, the interviewing counsel should be sufficiently familiar with the landscape of the company, project, billing methods, and other relevant areas. Background interviews with employees peripheral to the issue but cognizant of relevant company policies and procedures are a valuable tool for counsel to get up to speed. They ensure the individual conducting the investigation learns the lingo of the company and has the history of a particular project, contract, or service. Counsel should obtain an organizational chart, including historical versions, up front; witnesses often refer to individuals by either first or last name only. Counsel should be provided with a sense of the complainant's employment history and reporting structure.

It is also critical to understand the regulatory framework behind the issues at hand. Differences of opinion of legal or contractual requirements, or lack of in-depth industry knowledge of regulatory requirements, can lead to unfounded whistleblower complaints. But investigating counsel's lack of regulatory familiarity can lead to ineffectual interviews, whether because issues are not adequately spotted or the witness views counsel as naïve and therefore untrustworthy.

Interviews with complainants should be open ended, providing a non-confrontational avenue for the individual to tell their story. While questions can be posed to the witness, such questioning should be cordial and obviously for the purpose of fact gathering and clarification, not accusation or disagreement. Interviewers should be mindful that some employees may not be able, due to trauma or passage of time, to provide all details with particularity. Counsel must consider the reliability of the information provided against the potential that the witness's memory is affected by trauma or delay. Some witnesses may be unable to provide all information at once. Shorter and theme-focused interviews may help in these instances if preferred by the witness.

If the complainant is willing, ask them to prepare a statement of their concerns including the timeline of events and any reporting. Trauma informed witness interviewing indicates employees who feel traumatized by their experience may lack the ability to convey a story in linear fashion.[16] Writing out their story may provide a non-confrontational and self-paced opportunity for the complainant to recount their concerns.

In the more common instance that the whistleblower is anonymous, a former employee, and/or they will not participate in the investigation, access to their positions can be gathered through review of their contemporaneous communications. As mentioned above, most employee whistleblowers attempted to raise their concerns internally at some point prior to their departure. Counsel should begin by interviewing current employees who may have worked with or around the complainant.

Interviews of c-suite and executive-level employees are important, though much of the meatier information rests with line-level employees. Talk with employees who may have had varied interactions with the whistleblower and who may have differing perspectives on the issues at hand. Who worked closely with the whistleblower? Who did the whistleblower report to or oversee? Who was overseeing departmental compliance during the whistleblower's employment?

Interviews should determine whether changes were sought. Did the individual try to make process or policy changes? How were those proposed changes received? Pay close attention to culture, processes, and other dynamics that may have affected quality and/or proper reporting structures. What were the perceived actions taken by the company? In talking with executive-level employees, what were the *actual* actions taken by the company—some of which may not have been shared with line-level employees due to confidentiality, contractual obligations, or other constraints? Interviews at all levels will likely lead to documents, memoranda, and communications that will help verify interview narratives and/or piece together other aspects of the investigation.

Email and chat communications may also contain whistleblower perspectives. Depending on the company's retention policy, the complainant's email and/or chat history may be preserved for review. Determine the timeframe of interest and review communications sent out or received by the whistleblower. Be sure to use searches based on common language used by the employees. For example, the company may refer to a process formally but the employees on the ground use an acronym or shorthand version of the process. Evaluate whether the communications match the narrative presented by the whistleblower now. How about the interviews with other employees? Do not overlook more common terms such as "fraud" or "illegal" in searches.

During the communications review, pay particular attention to when communications were sent and the language used. Watch for expressions of elevated concern, particularly where these communications were directed to members of management or compliance. Be mindful of emails or communications sent outside of normal working hours or channels. There may be instances of the suspected whistleblower sending information to private accounts or investigators in advance of a qui tam suit. These key documents will provide context of what is important in the eyes of the whistleblower and may lead to additional data sources for review.

All companies use data: information that can serve as "the source of truth" in an investigation. But companies should be aware of knowledge gaps that whistleblowers may have. What access level were they granted? Where in the chain of data do they sit? While investigating counsel may find multiple sources of data to extract and

identify trends, line-item details, and scope of the issues at hand, the whistleblower's perspective may be narrower.

The same can be said for their longevity or role in the organizational hierarchy. For example, a newer employee may be unsure of the required contractual terms, a specific course of medical treatment, or even the appropriate way to bill certain items or services. The employee may experience confusion even though the company's operations fit squarely within the regulatory framework. Counsel should evaluate how the individual was onboarded and who conducted the initial training. Was it someone experienced or another newer employee? Evaluate whether the complainant was provided regular training sessions or merely exposed to informal practical experience.

When reviewing communications from a whistleblower, pay close attention to the intersection between the appropriate regulatory framework, company training and policies, and the reality of how operations functioned on a day-to-day basis.

Whistleblower Protections

Investigations often create undesired dynamics within the company. When conducting internal investigations, all parties should be mindful of the expectation that witness interviews are confidential. Witnesses should be informed of this expectation at the outset, with reiteration that the expectation applies to both the company and the individual. While the company should not indicate that employees are prohibited from speaking to agents or other enforcement bodies—such conduct would be viewed as obstructionist—employees can and should be informed of the requirement to protect privilege and the importance of maintaining confidentiality amongst themselves. This expectation applies to interviewing counsel as well. Information obtained from one witness should not be attributed to other witnesses.

This type of discourse in the background of an investigation can not only muddle memories and create undesired morale, it may also bring unwanted attention to the whistleblower.

Companies and employees at all levels of management should be mindful of the protections afforded to whistleblowers. The FCA, at Section 3730(h), prohibits retaliation against whistleblowers. Most jurisdictions require the individual to have an objectively reasonable belief that the FCA is being or could be violated in order to be protected. Whistleblowers that are subjected to retaliation are entitled to "reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, [two] times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees."[17] This relief is afforded to any employee, but also to contractors or agents.[18]

Retaliation includes any discharge, demotion, suspension, threats, harassment or any other form of employment discrimination.[19] Retaliation can also include reduction in pay or working hours, being blacklisted in the industry, modification of working conditions or territory, disclosure of one's status as a whistleblower, adjustments to reporting structure, or other activities that are taken as a result of the protected reporting activity.[20]

There are a number of other whistleblower protections, for example those found in the Federal Acquisition Regulation[21], the Sarbanes-Oxley (SOX) Act[22], the Occupational Safety and Health Act (OSHA)[23], the Dodd-Frank Act[24], the Anti-Money Laundering Whistleblower Improvement Act[25], and various industry-specific and state-level provisions.

Retaliation is defined differently among these various laws, but a good rule of thumb is to put oneself in the employee's position. While most companies have (or should have) an anti-retaliation policy, training employees, management, human resources, and other superiors about the types of activities that qualify as retaliation is prudent. Company employees should be mindful that whether or not an action qualifies as retaliation under a specific legal rubric, the perception of retaliation is subjective. And the perception of retaliation tends to result in the employee seeking legal advice on their rights.

Employment Decisions Involving Whistleblowers

The prohibition on retaliation does not mean that complainants are above reproach. Some companies experience situations where an employee repeatedly "blows the whistle" after receiving poor performance feedback or is found to violate company policy. In some instances, an employee may report a complaint in an attempt to insulate themselves from adverse consequences in connection with the employee's own wrongdoing.

As with all employees, whistleblowers are expected to perform their duties in good faith, abide by company policies, and adhere to applicable laws. Companies are not precluded from taking appropriate employment action against employees, notwithstanding their whistleblowing efforts, for poor performance or for any other legitimate business reason. However, these decisions are best informed by consultation with experienced employment counsel, as the whistleblower may argue that an adverse employment decision is pretext for retaliation. It is also worth revisiting the concept that whistleblowing often occurs informally and without involvement of legal or compliance. For this reason, when advising on employment decisions, human resources, in-house counsel, and/or compliance may find it prudent to explore the possibility that an individual was a whistleblower before any adverse action is taken. This will help to conduct due diligence, ensuring such action is justified and that the company is adequately prepared to defend against any assertion that the decision was motivated by retaliation.

Companies are frequently faced with the decision of whether to terminate employees in the course of an investigation. Termination, absent contractual requirements that ensure the terminated employee's continued cooperation, typically cuts the information flow from that individual. A signed declaration from the employee, prior to notifying them of a termination decision, may prove beneficial down the road to solidify information previously obtained and to confirm the employee's position regarding compliance.

On this point, in-person and documented exit interviews are prudent for all departing employees, regardless of their status as a potential whistleblower and regardless of whether the separation is voluntary or involuntary. The company should probe into potential compliance concerns harbored by any departing employee during their tenure. While not all employees will disclose concerns, record of the request to the employee and the submitted answers should be maintained. Employees should also be asked to confirm, by signed statement or questionnaire, that they have disclosed all known or suspected instances of non-compliance. Any concerns reported during exit interviews should be promptly and thoroughly investigated. It may also be prudent to evaluate any concerns disclosed against

any past or pending compliance complaints to identify unresolved or recurring issues.

When exiting employees, many companies seek broad releases of claims in severance agreements. Similarly, when terminating a subcontractor or vendor, there may be settlement of the contractual relationship that contains broad release language. These provisions typically seek waiver, release, and discharge from any and all liability, losses, judgments, claims, demands, actions, causes of action, suits of any kind, whether in law or equity, and whether known or unknown.

However, these releases are generally unenforceable as to FCA claims. This is because the claims purportedly released are not claims belonging to the individual or company. Under the FCA, the relator stands in the shoes of the government to file suit and "the action [is] brought in the name of the Government."[26] The government sustains the damages and the claims therefore belong to the government. The relator, as a third party, cannot release the suit or the government's claims absent consent from the government.

The FCA provides a mechanism for protecting these claims, providing that qui tam actions may only be dismissed "if the court and the [Government] give written consent to the dismissal and their reasons for consenting."[27] In addition, most courts have found that release of claims without the full knowledge and consent of the government is void as to public policy.[28] Because the purpose of the FCA is to bring awareness to the government of potential fraud, unwitting release of the claims is found to be against public policy. However, where the company can show that the government was aware of the specific fraudulent scheme and attendant claims prior to the qui tam suit being filed, the release may be enforceable.

Determining the Best Path Forward

Companies should embrace information brought to it by a whistleblower. Having procedures in place to thoroughly vet concerns, particularly when it comes to safety, quality, and compliance, is good corporate governance and evidence of corporate responsibility. Understanding the whistleblower's concerns and communications, in addition to other employee and leadership perspectives, key documents, data analytics, and the appropriate regulatory framework best positions the company to determine the best path forward, understanding that transparency, communication, and follow-up throughout the investigation is key. ⊙

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Endnotes

[1]31 U.S.C. § 3730(b)(1).

[2]*Id.* § 3730(b)(2), (4).

[3]*Id.* § 3733(a).

[4]Press Release, U.S. Dep't of Just. Office of Public Affairs, False Claims Act Settlements and Judgments Exceed $2.68 Billion in Fiscal Year 2023 (Feb. 22 2024), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-268-billion-fiscal-year-2023; U.S. Dep't of Just., Civ. Div. Fraud Sec. Stats. Overview *available at* https://www.justice.gov/opa/media/1339306/dl?inline (last visited July 9, 2024).

[5]U.S. Dep't of Just., Civ. Div. Fraud Sec. Stats. Overview *available at* https://www.justice.gov/opa/media/1339306/dl?inline (last visited July 9, 2024).

[6]*See United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 740-41 (10th Cir. 2019) (compliance employee initiated FCA *qui tam* suit against employer); *see also* Press Release, U.S. Dep't of Just., Office of Public Affairs, *Incyte Corporation to Pay $12.6 Million to Resolve False Claims Act Allegations for Paying Kickbacks* (May 4, 2021), https://www.justice.gov/opa/pr/incyte-corporation-pay-126-million-resolve-false-claims-act-allegations-paying-kickbacks (discussing FCA *qui tam* suit initiated by former compliance executive whistleblower).

[7]*See, e.g.*, *United States v. Quest Diagnostics Inc.*, 734 F.3d 154, 166, 168 (2d Cir. 2013) (holding that state ethical rules prohibited defendant's former attorney from serving as FCA relator in that particular case but not foreclosing an attorney's ability serve as a relator if professional and ethical obligations are satisfied); *see also* Kathleen Clark & Nancy J. Moore, *Financial Rewards for Whistleblowing Lawyers*, 56 B.C. L. Rev. 1697, 1705-44 (2015) (delineating potential ethical issues that may arise when lawyers initiate whistleblower suits under the FCA).

[8]31 U.S.C. § 3729.

[9]*Id.* ("If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.").

[10]*See Integra Med Analytics LLC v. Providence Health & Servs.*, 854 F. App'x 840, 842-45 (9th Cir. 2021) (holding data-mining company that brought *qui tam* FCA claim failed to state a claim but not foreclosing that data-miners could serve as relators); *United States ex rel. Doe v. Odom*, No. 3:20-cv-00803-CMC, 2021 WL 12173260, *10-12 (D.S.C. Feb. 2, 2021) (declining to dismiss relator's *qui tam* suit for failure to state a claim under the public disclosure bar

although relator relied on public data it collected to bring suit); *see also* Press Release, U.S. Attorney's Off., N. Dist. of Tex., *National Roofing Company Settles PPP Fraud Allegations for $9 Million* (Dec. 11, 2023), https://www.justice.gov/usao-ndtx/pr/national-roofing-company-settles-ppp-fraud-allegations-9-million (discussing data-mining relator's recovery in FCA settlement).

[11]*See* 31 U.S.C. § 3730(e)(4) (requiring dismissal of *qui tam* claims that allege substantially the same allegations or transactions publicly disclosed in certain proceedings, congressional and other federal reports, hearings, audits or investigation, or in the news media). However, this bar applies only to the whistleblower case; DOJ can proceed with the action notwithstanding the public disclosure subject to any statute of limitations arguments.

[12]*See* Laurie Robinson Haden, *How Companies Can Encourage Internal Complaints* (Dec. 2021), Bloomberg Law (noting that internal whistleblowing is uncommon when company culture fosters employee silence and fear); Marcia P. Miceli, Janet P. Near & Charles R. Schwenk, Who Blows the Whistle and Why, 45 INDUS. & LAB. REL. REV. 113,114 (1991).

[13]*See* U.S. Dep't of Health & Hum. Servs., Off. of Inspector Gen., *Submit a Hotline Complaint*, https://oig.hhs.gov/fraud/report-fraud (last visited July 9, 2024); U.S. Dep't of Def., Off. of Inspector Gen., *Submit a Hotline Complaint*, https://www.dodig.mil/Components/Administrative-Investigations/DoD-Hotline/Hotline-Complaint (last visited July 9, 2024).

[14]Having compliance hotlines is considered a hallmark of a good compliance program. *See* U.S.S.G. § 8B2.1(b)(5)(C) (effective compliance programs have a publicized "system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation").

[15]*See* Carl R. Oliver & Francis J. Daly, Encouraging Internal Whistleblowing (And More!), Santa Clara Univ., Markkula Center for Applied Ethics (June 1, 2007) (emphasizing that companies should foster a culture encouraging internal whistleblowing by, among other things, instructing managers to implement open door policies and safe reporting environments and explaining the advantages of internal whistleblowing).

[16]*See* Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* 4 (July 2019), *available at* https://www.hklaw.com/-/media/files/insights/publications/2019/07/fairequitabletraumainformed-investigationtraining.pdf?rev=77d904f7cd0141fcbd25a1620913a84a&sc_lang=en&hash=A5D0EE3BD015CA56A41CB2B0B0C98428.

[17]31 U.S.C. § 3730(h)(1).

[18]*Id*.

[19]In general, to establish a successful retaliation claim under the FCA, the relator must show that: (1) the relator engaged in protected activity by acting in furtherance of a *qui tam* suit; (2) the relator's employer knew of these acts; and (3) the relator's employer took adverse action against the relator as a result of these acts. *See e.g. Glynn v. EDO Corp.*, 710 F.3d 209, 214 (4th Cir. 2013).

[20]*See, e.g.*, *Hammon v. Northland Counseling Ctr., Inc.*, 218 F.3d 886, 893 (8th Cir. 2000) (relator created a fact issue on whether she was entitled to emotional distress damages after company terminated her employment and disparaged her character in retaliation for bringing *qui tam* lawsuit); *United States ex rel. Bachert v. Triple Canopy, Inc.*, 321 F. Supp. 3d 613, 622 (E.D. Va. 2018) (demotion, including reduced pay, may constitute retaliation under the FCA); *Ortino v. School Bd. of Collier Cnty.*, No. 2:14-cv-693, 2015 WL 1579460, at *3-4 (M.D. Fla. 2015) (holding that FCA retaliation provision extended to former employee that alleged she was blacklisted by former employer from other company positions).

[21]48 C.F.R. Subpart 3.9.

[22]18 U.S.C. § 1514A.

[23]29 U.S.C. § 660.

[24]12 U.S.C. §§ 5481-99.

[25]31 U.S.C. § 5323(a)(5), (g), (j).

[26]31 U.S.C. § 3730(b)(1).

[27]*Id.* § 3730(b)(2).

[28]*See, e.g.*, *United States v. Purdue Pharma L.P.*, 600 F.3d 319, 332 (4th Cir. 2010) ("When the government is unaware of potential FCA claims the public interest favoring the use of *qui tam* suits to supplement federal enforcement weighs against enforcing prefiling releases."); *see also* Claire M. Sylvia, The False Claims Act: Fraud Against the Government § 10.42 (Aug. 2023).