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Notes On: Can I Be a Whistleblower If I Already Signed a Nondisclosure Agreement?

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Your employer is underpaying its taxes. You discover the failure to pay taxes. You feel that you should share this failure with the Internal Revenue Service. In weighing whether to disclose to the IRS you remember that when you were hired you signed a nondisclosure and confidentiality agreement. Will disclosing your employer's violations to the IRS contravene your agreement? Will you be liable for a breach of the agreement?

Recent SEC regulations–17 C.F.R. § 240.21F-17(a)–and a decision from the Administrative Review Board–*Vannoy v. Celanese Corporation*–indicate that signing such an agreement does not limit the employee from becoming a whistleblower with one of the federal government's whistleblower programs.

This article will discuss an employee's ordinary duties under a nondisclosure agreement when making a disclosure to a federal whistleblower program. It will review recent regulations and decisions favorable to whistleblowers in context of prior decisions that were more oppressive to whistleblowers. Finally, it will cover best practices for a whistleblower making disclosures to a government agency.

Background

The federal government has implemented various rewards programs for individuals who come forward with information that can return money to the public coffers. For example, the IRS Whistleblower Office accepts disclosures of tax underpayment; the Securities

and Exchange Commission and Commodity Futures Trading Commission have their own whistleblower offices for accepting disclosures to form the basis of enforcement actions; and perhaps the most robust of these programs is the False Claims Act, which allows individuals to file a complaint in district court on behalf of the federal government. The complaint is then submitted for the government's review to prosecute.

Nondisclosure Agreements

Employers use confidentiality or nondisclosure agreements to bar employees from using information they obtain during employment after that employment is terminated.

The initial focus of these agreements was in preventing the disclosure of trade secrets. But many employers have shifted their gaze to using these agreements to keep whistleblowers from taking their concerns to *any* external institution, including enforcement agencies.

Typical terms of a nondisclosure agreement purport to require an employee to:

- Keep confidential proprietary information
- Use proprietary information exclusively for permitted purposes
- Not disclose proprietary information to anybody other than the employer or its agents
- Inform the employer of any disclosures of proprietary information

Proprietary or confidential information often includes typical trade secret information, customer or patient information, or information marked proprietary or confidential by the employer.

Employees are placed in a precarious position when they have uncovered nefarious activities by their employers. Employees wonder whether the agreement bars them from disclosing the malefactions to those in a position to prosecute the violations.

Recent Regulations and Decisions

Employees can take heart that the tide of using these agreements to silence whistleblowers is turning. One strong example comes from the SEC's regulations for whistleblowers making disclosures to the Commission. Specifically, Section 240.21F-17 of Part 17 of the Code of Federal Regulations disallows employers from "tak[ing] any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, *including enforcing, or threatening to enforce a confidentiality agreement.*" (Emphasis added.) This clear statement of policy evidences the Commission's intention to protect employees where employers have attempted to box them in.

Similarly, federal district courts have reasoned that there is a strong public policy protecting employees subject to nondisclosure agreements in the False Claims Act context; specifically where these employees use particularized information for filing False Claims Act cases on behalf of the government–also called *qui tam* actions. Such employees may be exempt from liability resulting from the agreement. These courts have argued that this public policy would be frustrated if an employer could simply require all employees to sign nondisclosure agreements to silence whistleblowing; worse, it could compel complicity in fraudulent conduct.

The recent decision by the Administrative Review Board in *Vannoy v. Celanese Corporation* in 2011 is a welcome support to whistleblowers contemplating making a disclosure to one of these programs. In that case, the employer suspended the employee without pay following his disclosure of confidential company information to himself in furtherance of his IRS Whistleblower disclosure. The ARB looked to Congressional intent and found that one of the purposes of the whistleblower law at issue was to "enhance protections for employees who suspect misconduct by their employers when they engage in lawful conduct to disclose the misconduct." The Board recognized the tension between the employer's interest in protecting proprietary information and the whistleblower rewards programs created by Congress, passing this statute showed Congress' intent to entice whistleblowers to provide original information that would otherwise be unavailable or inaccessible to the government. Citing these "significant enforcement interests," the Board

determined that the crucial question was whether the whistleblower had obtained and provided original information in the disclosures to the government. The logical next step in the analysis is that disclosing original information is permitted and that information beyond this subset would require additional analysis by an Administrative Law Judge.

The judge in this case then considered the facts in light of the ARB's decision. He determined that the employee's disclosures were original information meriting protection: "[employee's] sole purpose in transferring [employer's] documents was to support his [internal complaint] and/or his disclosures to the IRS." These decisions read together–and in light of the Board's refusal to vacate the judge's decision even when asked by the parties when settling the case–will serve to steady the sometimes troubled waters employees face.

Best Practices

When an employee becomes aware of potentially fraudulent behavior at her employer, the employee should seek out legal counsel. It is particularly important, as described above, to have legal advice when determining which documents the employee is permitted to disclose notwithstanding the nondisclosure agreement.

As the Ninth Circuit reasoned in *U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, employees filing False Claims Act claims are not given free reign by virtue of the fact that they will file a claim. Employees should be scrupulous in determining which documents to use in supporting such a claim. The indiscriminate or wholesale downloading of proprietary documents from an employer's server may still lead to liability for the employee.

If an employee has already obtained proprietary information and has been terminated by the employer, in many cases, the employee will need to negotiate the return of some or all of the proprietary information.

Finally, when an employer requests return of all proprietary information, there should be a careful review of which information actually falls within the parameters of that defined term. Each nondisclosure or confidentiality agreement is different and this term can be defined in a number of ways, some possibilities are mentioned above. This review may require the involvement of the government agency receiving the employee's disclosure.

Conclusion

So should you make your disclosure to the IRS? While every case is different, as demonstrated above, Congress and tribunals are highlighting the important role whistleblowers play in society. Legislatures are enacting laws to protect them and their disclosures; tribunals recognize the need to exempt them in certain instances from agreements contravening public policy. There is real momentum behind whistleblowers and they should be encouraged by this recent progress.