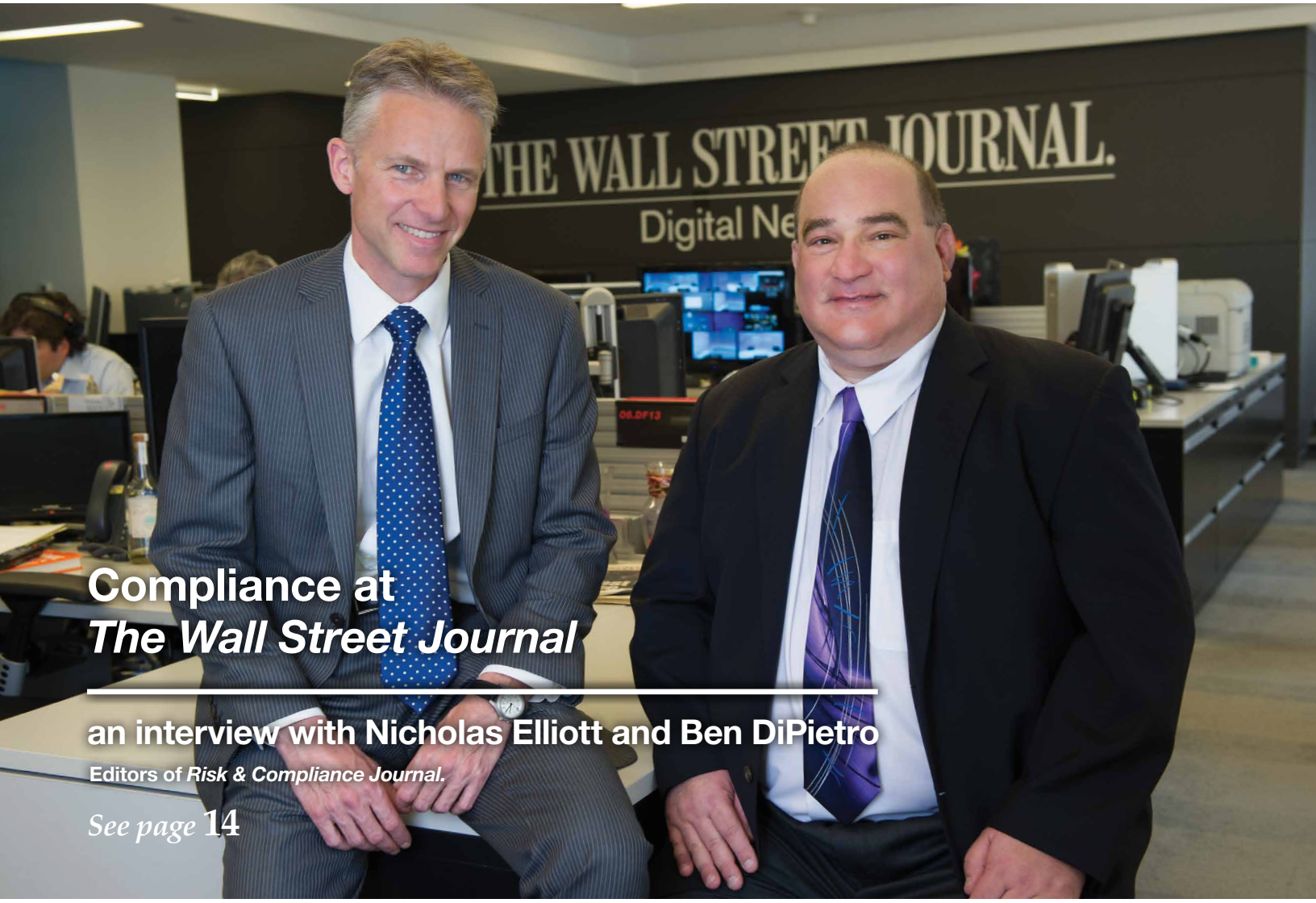
Compliance & Ethics Professional

August 2014

A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

www.corporatecompliance.org



Compliance at *The Wall Street Journal*

an interview with Nicholas Elliott and Ben DiPietro

Editors of *Risk & Compliance Journal.*

See page 14

by R. Scott Oswald and J. Thomas Harrington

Company liability and employee protections for FCC whistleblowers

» While there is no specific statute protecting employees of FCC-regulated companies, there are some general employment laws that apply.

» Companies need to implement a compliance program that addresses whistleblower concerns.

» Employers should familiarize themselves with statutes providing protections to their workforce.

» Retaliation when an employee has disclosed a concern with noncompliance with a law or regulation may result in liability and damages therefrom.

» Both federal and state laws protect employees, so knowing your particular jurisdiction is key.

The Federal Communications Commission (FCC) has promulgated myriad regulations applicable to manufacturers of radio equipment. What employers and employees may not realize is that there is an added layer of liability that radiates from these regulations. If an employee discloses a violation of the FCC's regulations, an employer may be liable for discharging the employee because of the disclosure. Both employers and employees should be aware that there is a patchwork of statutory and common law protecting employees against termination when they have disclosed FCC violations.

Oswald

Harrington

The Department of Labor enforces and administers the anti-retaliation provisions of more than 20 statutes. These protections for employees range from industries such as surface transportation to the financial sector. But not every industry is represented.

There is no particularized statute applicable to whistleblowers in the industries regulated by the FCC. Instead, employees working in this industry rely on a cobble-work of statutes and common law when they make disclosures to their employers.

Hypothetical

Imagine an employee is testing a radio instrument for her employer to determine its compliance with 47 C.F.R. § 90.210 (regulation for transmitters used in the radio service and applicable emission masks). In the course of testing, she finds that the instrument is nowhere near the required standards. The employer serves both private customers and government customers. After testing, the employee reports her findings to management. Management tells her that she should tinker with the unit until it passes, but not make changes to equipment already in production. The company will simply refer to the passed test for these units. Again, she expresses her

concerns but proceeds as directed. She is able to get the tester unit to pass. Units that do not meet FCC regulations are sold to private and government customers.

Coverage

The first question the reader of the above hypothetical will likely ponder is the liability of the company to its customers, but that particular question is beyond the scope of this article, particularly because it is the first question most consider. Let us state only that the company should not have proceeded this way and should have already implemented a compliance program where an employee could take these concerns and they could be dealt with prior to shipping non-compliant product.

The employee should be treated like all other employees. But it is too often the case that the company begins to see the disclosing employee, or whistleblower, as a threat. This can lead to retaliation.

Not immediately apparent is how the company should treat the employee who disclosed the noncompliance. Again, the right answer is the less interesting one: The employee should be treated like all other employees. But it is too often the case that the company begins to see the disclosing employee, or whistleblower, as a threat. This can lead to retaliation.

Retaliation can take many forms: discharge, demotion, harassment, etc. But not all actions that appear retaliatory lead to liability. Therefore, it is important to know which statutes and common law are applicable. Here, the most likely candidates under federal law are the protections for employees for contractors under the National Defense Authorization Act, 10 U.S.C. § 2409, and the protections for employees under the False Claims Act, 31 U.S.C. § 3730(h). These are only applicable when government funds are involved. The most likely areas for liability under state law stem from the tort of wrongful discharge in violation of public policy or a statute protecting whistleblowers.

Broad principles of retaliation law

There are some guiding principles to provisions protecting against retaliation in the workplace. Ordinarily, an employee must engage in protected activity. Protected activity can be defined in many ways, but the thread running through the definitions in the whistleblower arena is that the employee is disclosing information, either internally or externally, about a perceived issue. This point will be explored in greater detail below. The second general element of a retaliation claim is that the employer must have knowledge of the protected activity. Finally, to prove a claim, the employee must prove that the employer took an adverse employment action against the employee because of the protected activity. In response, the employer may defend its taking an adverse employment action by stating a legitimate business reason. The burdens applicable in this framework vary depending on the law under which an employee is seeking relief.

National Defense Authorization Act

Congress passes a National Defense Authorization Act (NDAA) each year to

fund defense-related activities. In 2013, Congress passed an NDAA that included new provisions for whistleblowers involved with defense contracting programs. Effective July 1, 2013, Section 827 of the 2013 NDAA brought about sweeping changes to the defense contractor whistleblower protection program. This extends protections to contractors and subcontractors for defense contracts and includes internal complaints as protected activity. Section 828 proceeds to extend the same rights previously reserved to only defense contractors to contractor and subcontractor employees from agencies beyond the Department of Defense. That is, nearly any contractor or subcontractor for the government may receive protection from retaliation for disclosing "gross mismanagement, gross waste, abuse of authority, or violations of law, rule, or regulation" to nearly *any* federal funds, contracts, or grants. Congress did not include the intelligence community.

Procedurally, an employee must first make a report to the Office of Inspector General (OIG), who will investigate the complaint. If the OIG denies the complaint or takes no action within 210 days, the complainant may file suit in federal district court.

Analysis

Here, if the company determined that it would ignore the emission requirements promulgated under the regulation, doing so would be a "violation of law, rule, or *regulation*" if the company is a contractor receiving federal funds. The lynchpin of liability, therefore, will be the relationship between the company and the government. The disclosures made internally are likely covered and protected. Adverse employment actions stemming from these disclosures will lead to liability for the company.

False Claims Act

An older statute, the False Claims Act's (FCA) primary goal is to guard the federal government from fraud and abuse by federal contractors. The anti-retaliation provisions of the FCA were included in the 1986 amendments with Congress's recognition that "often the employee within the company may be the only person who can bring the information forward."[1] The FCA's anti-retaliation provision provides that any "employee, contractor, or agent shall be entitled to all relief necessary" to be made whole if he or she is discriminated against "because of [his/her] lawful acts… in furtherance of an [FCA] action… or other efforts to stop one or more violations of [the FCA]."[2] Procedurally, there are no administrative exhaustion requirements. That is, a plaintiff can proceed directly to federal district court and a three-year statute of limitations applies.

For a plaintiff to prevail in an FCA claim, he/she must demonstrate that he/she engaged in protected conduct, that the employer knew the employee engaged in protected conduct, and that the employer discriminated against the employee because of the protected conduct.

Analysis

The analysis here is much like that under the NDAA. The employee likely engaged in protected activity by disclosing the failure to follow the regulations applicable for emissions. Shipping products to the government that do not comply with government regulations may support a FCA claim, depending on the contract for any particular suit, but in most instances such a contract will require compliance with federal regulations. Furthermore, an actual violation is not required for employment liability to attach. The employee simply needs to show that his/her actions could be characterized as an effort to stop a violation of the FCA.

Wrongful discharge

Generally, a wrongful discharge action is premised on an employee's engagement in protected activity. This protected activity is ordinarily defined as taking an action in furtherance of or protected by public policy. Public policy, depending on the state, can include both state and federal constitutions, statutes, regulations, and judicial opinions. If not yet readily evident, it is important to check the law in each state depending on the circumstances. An important component in each jurisdiction is that the employee is no longer employed, through discharge or constructive discharge. In broad strokes, that is the main difference in evaluating such a claim. That is, whether the employee was discharged. Additionally, the above statutes provide for attorney's fees. Wrongful discharge actions do not apply fee shifting.

Conclusion

Both employers and employees need to be aware of the potential liability and protections that exist when an employee discloses potential workplace issues. Employers should act swiftly to rectify any noncompliance and understand the potential consequences of retaliating against a whistleblowing employee. ✳

1. *See* S.REP. NO. 99–345, at 35 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5300.
2. *See* 31 U.S.C. § 3730(h)(1).

R. Scott Oswald *(SOswald@employmentlawgroup.com) is Managing Principal at The Employment Law Group, P.C. in Washington DC.*
J. Thomas Harrington *(tharrington@employmentlawgroup.com) is Principal at The Employment Law Group, P.C. in Washington DC.*