

Lunch Discussion

Whistleblowers Without Borders: A Lawyer's Casebook

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Introduction

Mary Inman is a partner at Constantine Cannon's London office. After 20+ years representing whistleblowers (those who speak up) in the U.S., she moved to London in July 2017 to launch the firm's international whistleblower practice. Her move was driven by an increasing need for representation under and knowledge of the various U.S. laws and protections that can apply to whistleblowers around the world. She specialises in representing whistleblowers from the U.K., Europe and worldwide under the various American whistleblower rewards programmes, including the Federal and various state False Claims Acts and the SEC, CFTC, IRS, and DOT whistleblower programmes.

What is Whistleblowing?

After describing her background and purpose for being in London, Mary began the introduction of her presentation with the question, "What is Whistleblowing?" and specifically what are the types of whistleblowing that are covered by the American whistleblower rewards programmes.

She pointed out that for most people, the word "Whistleblower" conjures thoughts of individuals like Edward Snowden or Chelsea (Bradley) Manning who leaked national security information to expose alleged malfeasance by the United States Government, whereas the American whistleblower reward programmes seek to reward whistleblowers who expose fraud being perpetrated against the U.S. Government or its regulatory interests (that is, where the Government is the victim as opposed to the perpetrator). Mary described the archetypal whistleblower under the U.S. whistleblower rewards programmes as a company insider, that is, an employee of a company that has undermined American regulatory interests (i.e., violated U.S. tax or securities laws) or contracted to provide products/services to the U.S. Government (e.g., the Medicare program or Defense Department). And while the fraud must impact the U.S., it can have international implications as well.

While this part of the presentation focused primarily on the United States whistleblower reward programmes, Mary also discussed whistleblower legislation in other parts of the world. In the United Kingdom and most of Europe, whistleblowing laws are more reactive than proactive. This means that the laws seek to protect the whistleblowers after they have suffered retaliation and other negative employment action for speaking up, rather than empowering whistleblowers to bring forward the information about wrongdoing to the Government authority charged with enforcing such transgressions and requiring the regulators to act on the whistleblower's information. While whistleblowers want to be protected from employer retaliation, they also want the conduct they originally brought to light to be fixed and the agencies responsible for addressing such malfeasance to hear their message and take action to correct the wrong. She also pointed out that in addition to being reactive, UK programmes do not empower whistleblowers to the degree American programmes do. For instance, the United States SEC whistleblower programme empowers the whistleblower, as it gives them the ability to bring the information to the SEC's Office of the Whistleblower and affords them protection against retaliation by their employer for bringing issues to light. Mary highlighted that in the UK and the European whistleblower programmes, this degree of action and protection is often hard to come by.

Whistleblowing Works

Mary began this part by outlining that whistleblowers allow the government, and therefore law enforcement, to have a more developed case than would be possible by external regulators or auditors. Inside information from whistleblowers creates what Mary called, "a roadmap to the fraud," and it almost always assists the regulators, leads to more company penalties, more prosecution and criminal charges of the people responsible and makes it easier to prove the fraud was intentional.

There are a number of U.S. programmes that can be applied internationally. These include the False Claims Act (FCA), the Internal Revenue Service (IRS) Whistleblower programme for tax frauds, the Securities & Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC). There are also Whistleblower programmes for companies trading on the U.S. stock exchanges or dealing in America, and the Department of Transportation (DOT) and National Highway Traffic Safety Administration (NHTSA) Auto Safety Whistleblower programmes for safety defects in auto manufacturing. Various other countries have also created their own whistleblower laws incorporating parts of the U.S. model, but none are as fully developed or encompassing. These countries include Canada, Namibia, South Korea, the UK, and the European Commission is working on a directive for all member countries.

Incentives and Protections

Mary pointed out that the payment of monetary rewards to whistleblowers is often a controversial topic because of perceived negative repercussions. However, in her view, it is important to reward the employees who raised these concerns because they could potentially lose their job and may not be able to find employment in the future. Less discussed, but an equally important topic regarding whistleblower protection, is anonymity. This is because the fear of retaliation by managers is the most common reason for not making a claim about fraud.

SEC – One of the most commonly used among the aforementioned programmes is the Securities and Exchange Commission's (SEC) Whistleblower programme. An employee can provide information about a fraud to the SEC, and if enforcement action is taken, the employee may be eligible to receive compensation. The SEC also prevents employers from impeding employees' abilities to report frauds or communicate with the SEC. The SEC provides strong whistleblower protection, and it may be possible to remain entirely anonymous, even to the SEC. From the years 2010 to 2017, 51 whistleblowers received approximately \$250 million in rewards.

FCA – Another whistleblower programme available for use internationally is the False Claims Act (FCA). In addition to a federal FCA which allows whistleblowers to launch a lawsuit in the Government's name where they have information that a federal government entity has been defrauded, there are over 30 states with State False Claims Acts that protect fraud impacting state-funded projects/activities/services. Whistleblowers are required to file FCA lawsuits under seal to allow the Government an opportunity to investigate the whistleblower's allegations without the defendant knowing. However, Mary pointed out that the FCA does not fully protect the identity of the whistleblower as the whistleblower's name is almost always revealed at the time the Government decides whether to join the whistleblower's case. Rewards under the FCA range from 15-30% of the recovered amount based on the Government's intervention and the whistleblower's contribution as long as the whistleblower did not plan or initiate the fraud.

IRS - The U.S. Internal Revenue Service (IRS) also has some very high incentives, but fewer protections for the whistleblower. It should be noted that the US rewards programme for whistleblowers is restricted to those raising issues regarding government funded activity.

From the Company Perspective

Mary began the fourth part of her presentation by highlighting that many companies see whistleblowing in a negative light because it can be a threat to the company. However, she also observed that consumers and investors are beginning to see whistleblowers in a more positive light, as both want to know as much about the companies they are dealing with as possible.

Mary included a discussion at the end of her presentation about how companies can best avoid lawsuits of this nature. There were three main topics aimed mostly around changing the way companies view whistleblowers and how to deal with employees that raise concerns.

1. Whistleblowing is a last resort - Most whistleblowers raise concerns internally, typically two or three times before having to resort to formal whistleblowing when their concerns are either discounted or completely ignored. They generally aim not to be a whistleblower but to change the company for the better by raising these concerns internally.

2. Listen to what they are saying - Even if an employee doesn't have a full picture or brings up something of little or no concern, take time to investigate the employee's concerns so they can see that you are serious about acting in an ethical way. If their concerns are just a misunderstanding, then explain to them to the extent allowable the reasons why. Retaliation in any way will not benefit the company in the long run. If employees feel as though they may lose their job or be punished in another way, they will be less likely to raise concerns internally and skip to the litigation process instead. Speak up and non-retaliation policies in the employee code of conduct can be useful as long as they are properly followed by management.
3. Change the narrative - Fraud detection is vital to the health and survival of an organisation. Whistleblowers should be regarded as ethical heroes and courageous employees instead of snitches, tattletales, or disloyal employees.

What the Future Holds

While Mary acknowledged that many elements of whistleblowing programmes have previously originated from the United States, she noted a great deal of innovation and advancement of whistleblower programmes worldwide. In the coming years, it is expected that member states will adopt the European Commission's directive for EU-wide whistleblower protection. This protection includes formation of a whistleblower government agency and anonymity, and also importantly, compensation. Organisations worldwide are now starting to recognise that compensation and rewards are huge factors for whistleblowers, as it further encourages them to come forward with their cases in the face of possible retaliation. However, rather than a fixed percentage of the government recovery as a reward like in the U.S. programmes, the EC directive talks about the establishment of a whistleblower fund to help with legal aid and whistleblower support.

Finally, Mary concluded her presentation with great hopefulness about the future of whistleblowers. She noted the improved perception of whistleblowers as pivotal agents of global change as a result of their roles in the #MeToo Movement, Paradise and Panama papers and Cambridge Analytica's Facebook targeting model, which will be positive for business environments worldwide. With the advent of new programmes, updating of current ones, and the use of more rewards and compensation, Mary is positive that whistleblowing will become a more manageable and a doable process for individuals in all sectors of business. Mary looked forward to a future that protects and empowers all whistleblowers, independent of the severity of the situation.

Q&A

The presentation was followed by questions from the audience. Among the issues raised were:

- Can anonymity for the whistleblower really be guaranteed?
A lot of the times, due to the specific nature of the issue or the limited amount of people involved, it may be quite easy to identify the whistleblower. Mary acknowledged that this is indeed an issue of concern and depending on the situation protecting the whistleblowers' identify may not always be possible.
- Should corporations offer incentives to encourage internal speak up?
- How should whistleblowers, who have been actively participating in the crime, be dealt with?