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WHEN WHISTLEBLOWERS CALL: PLANNING TODAY FOR EMPLOYEE COMPLAINTS DURING AND AFTER THE COVID-19 CRISIS

To Our Clients and Friends:

The COVID-19 pandemic has caused unprecedented global economic turmoil and disruption. There are daily reports of massive employee layoffs across all segments of the economy, and millions of people are suddenly out of work. Federal and state governments have stepped in with numerous new, patchwork and ill-defined programs, rules and regulations to address the unemployment crisis and related effects. This is all reminiscent of the days after 9/11 and the 2008 Great Recession. And if what's past is prologue, companies should expect that current and former employees will unleash an onslaught of allegations about company misconduct, both COVID-19-related and otherwise. Indeed, government regulators and the plaintiffs' bar are already publicizing various reporting mechanisms for disgruntled employees seeking to raise such claims.

In this context, increased whistleblower complaints are inevitable. While most companies already have policies and processes in place to address those complaints, it is no longer business as usual. Existing programs likely do not account for a displaced and remote workforce, rapid and substantial employee layoffs and furloughs, ongoing work in an environment where health and safety are at the forefront, or any of the countless other disruptions that COVID-19 has caused to a company's operations. Yet with so many immediate and pressing issues to address during these challenging and unprecedented times, it is understandable that evaluating and updating a company's whistleblower action plan may not be seen as a mission-critical task. Inaction, however, could have detrimental effects that last long after the pandemic has been contained and the economy has begun to recover.

As before COVID-19, and even more so now, it is important that companies have a robust action plan for addressing employee complaints, as well as related governmental investigations and civil litigation. There are tried and true methods for addressing whistleblower complaints. For companies that have not yet implemented them, now is the time to do so.

But even for companies that have established a whistleblower action plan, COVID-19 may cause material changes at the company that render the plan ineffective or incomplete. For instance, a company's anonymous complaint hotline may no longer be operational because the third-party vendor has shuttered, or a company's investigative process may not apply because positions referenced in the policy have been eliminated. And the fact that compliance professionals likely are working remotely could result in delays or failures in addressing employee complaints while more pressing business issues are addressed. Notwithstanding that the written policies and established practices do not reflect a company's current working environment (especially in these unprecedented times), a company could

still be criticized by a whistleblower, government regulator or plaintiffs' attorney for not following its written policies or established processes to a tee. They will no doubt argue that the COVID-19 pandemic does not justify departures from the standard protocol for handling employee complaints. So it is important that a company's current whistleblower action plan accurately reflect the company's current operations.

What's Past Is Prologue: COVID-19-Related Unemployment Inevitably Will Spawn Whistleblower Claims

It may take years to know the full economic and societal impact of COVID-19, but it is already clear that in the near-term the pandemic will result in unimaginable layoffs and reductions in force. During the two weeks ending April 2, 2020, some 10 million American workers filed unemployment claims, smashing previous records.[1] And it appears we are just at the beginning, with experts estimating unemployment rates may reach as high as 20%, far exceeding unemployment at the height of the Great Recession.[2] And unlike past economic downturns, which impacted certain industries more than others, this pandemic affects every segment of the U.S. economy.[3]

With such rapid and unprecedented economic dislocation across the global economy, it is reasonable to assume that there will be a commensurate increase in whistleblower claims. In part, these claims may stem from actions taken by workers under economic stress or other pressures that could give rise to reportable conduct, or because the usually effective precautions and controls fail during this challenging time. They might also stem from newly passed laws or policies promulgated to address COVID-19-related misconduct, as happened during the Great Recession with respect to the finance industry. And they might result from the fact that workers, confronted with the prospect of being let go and resulting economic instability, will have greater incentive than ever to report any suspicious activity, or to claim that they had done so after the fact, especially given the substantial monetary rewards that can be obtained.[4]

Cracking Down: Regulators Are Encouraging Whistleblowers to Report COVID-19-Related Violations

In addition to the increase in potential personal incentives to come forward, federal and state regulators have signaled that they will prioritize enforcement investigations and actions against COVID-19-related misconduct. This too will encourage an increase in whistleblowing. Before the COVID-19 pandemic, various agencies already included highly lucrative whistleblower incentives as part of their enforcement mechanisms. The False Claims Act, for example, allows individuals to sue corporations on behalf of the United States, and to retain a percentage of any penalty awarded.[5] At the same time, such reporters are obliged to provide all of their evidence to the U.S. Department of Justice (DOJ), making enforcement yet more potent. Given that the False Claims Act extends to Medicaid and Medicare programs, it is logical to expect that many forms of healthcare-related misconduct in the current crisis may be reported through this channel.[6]

Similarly, the Sarbanes-Oxley Act of 2002 created mandatory reporting requirements for fraud and other illegal activity, and provides protections for whistleblowers who come forward.[7] And under the Dodd-

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Frank Act, passed in 2010 in part as a reaction to the 2008 financial crisis, whistleblowers who report financial misconduct to the U.S. Securities and Exchange Commission (SEC) are entitled to receive substantial financial awards, provided that they (1) voluntarily (2) provide original information (3) to the SEC (4) that leads to a successful enforcement action.[8] Dodd-Frank also strengthened anti-retaliation protections against whistleblowers. Awards typically range from 10% to 30% of the monetary sanction the SEC collects, meaning this incentive can be extremely powerful.[9] And the SEC, through its Office of the Whistleblower, makes it easy for employees to report tips via an interactive website that prominently highlights the fact that whistleblowers have received awards of over \$300 million in recent years.[10] Whistleblower protections exist under scores of other federal laws (such as the Occupational Safety and Health Act) and state laws as well.[11]

During the current pandemic, regulators will turn to these and other channels to crack down on corporate misconduct, particularly if it is in any way related to the COVID-19 pandemic. The DOJ, for example, has urged citizens to report COVID-19-related fraud schemes by calling or emailing the National Center for Disaster Fraud (NCDF) and, in turn, information reported to the NCDF is disseminated to relevant federal law enforcement agencies and U.S. Attorney's Offices across the country.[12] This program reflects a larger shift in priorities, as announced by Attorney General William Barr last month, in which "detecting, deterring, and punishing wrongdoing" seen as connected to the COVID-19 pandemic has taken center stage.[13] The DOJ has even launched its own website (<https://www.justice.gov/coronavirus>) as a central repository for the general public to report anonymously any concerns about COVID-19 fraud.

State and local regulators are also focusing on investigating and punishing COVID-19-related misconduct. For example, New York State has launched the "COVID-19 'New York on PAUSE' Enforcement Task Force," which will receive and investigate claims via an online complaint intake form.[14] And the New York Attorney General has been outspoken about investigating whistleblower claims raised by employees concerning COVID-19 health concerns in the workplace. California's Attorney General has made price gouging linked to shortages caused by the outbreak a top enforcement priority, encouraging citizens in his state to come forward with any information on such misconduct.[15] Likewise, the Washington Attorney General has undertaken enforcement actions against local businesses engaged in illegally overpricing products like masks and hand sanitizers.[16]

As the pandemic has rolled across the U.S. in recent weeks, whistleblowers have already started to come forward publicly. For instance, an anonymous bus operator for Atlanta's MARTA transit system made news for alleging that MARTA's buses were not properly sanitized to address the virus.[17] Likewise, a nurse in Illinois has filed a lawsuit alleging that she was fired in retaliation for raising concerns regarding inadequate provision of masks for healthcare workers.[18] And in New Jersey, counsel for a labor union has filed charges alleging that warehouse workers and others were fired in retaliation for speaking out about poor coronavirus safety practices.[19] As the virus spreads, these trends will surely continue.

Additionally, legislation such as the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act,[20] a \$2.2 trillion stimulus that provides for substantial loans and subsidies to businesses, creates the potential for misuse or perceived misuse of funds. Because of the potential for abuse, the CARES

Act contains several oversight provisions, including providing additional funding to create oversight bodies that will investigate how companies use funds made available under CARES. Specifically, the CARES Act provides funding to existing inspector general offices in several government agencies and creates a Special Inspector General for Pandemic Recovery in the Treasury Department, a Congressional Oversight Commission, and a Pandemic Response Accountability Committee. In addition, Speaker Nancy Pelosi has announced a bipartisan House Committee to oversee the distribution of funds under the CARES Act, stating that “[t]he panel will root out waste, fraud, and abuse and will protect against price gouging, profiteering, and political favoritism.”^[21] The additional monitoring and scrutiny that accompany CARES funding will create even more opportunities for whistleblowers to emerge.

Finally, in the current 24/7 media climate, with the country appropriately focused on the crisis, COVID-19-related fraud will likely gain substantial coverage, as well as the focus of government regulators (and plaintiffs’ attorneys) looking to publicize available whistleblower mechanisms.

Being Prepared: Employers Will Need Robust Action Plans in Place to Handle Increased Whistleblower Claims

The most effective way to prepare for the expected increase in whistleblower claims in the current environment is to ensure that a company has an appropriate and robust action plan in place, and sticks to that plan as whistleblower scenarios arise.^[22] While a comprehensive whistleblower action plan is complex and multi-faceted (and not “one size fits all” for every business), below are some key issues to consider when reevaluating an action plan.

- ***Knowing the Law***: This is a rapidly changing environment. Companies should take stock of the various whistleblower laws and regulations that may apply within their given industry, and whether any new guidance is being issued with regard to those laws related to the COVID-19 pandemic. In particular, be aware of whether whistleblower complaints may trigger mandatory reporting to federal or state governments under various government programs.
- ***Communications and Reporting Channels***: Companies should ensure that they have clear and operational internal communication and reporting channels for whistleblower complaints. This includes ensuring that existing processes have not been compromised as a result of work-from-home protocols or layoffs. For instance, companies should update their compliance plans to ensure that they permit telephone calls or emails to human resources, legal and compliance departments—and provide current contact information for doing so—as opposed to scheduling an in-person meeting or simply assuming that pre-pandemic systems will continue to operate normally. Similarly, companies with compliance hotlines should make sure those hotlines remain operational. Companies should then re-emphasize the continued availability of these reporting mechanisms to employees, particularly if they are updated to reflect remote work environments. As always, this messaging should drive home the company’s non-retaliation policy.
- ***Robust Response and Investigative Protocols***: Companies should consider whether existing investigation protocols need to be updated to reflect the current atmosphere. Most obviously,

remote work may make it more difficult to follow existing guidelines with regard to confidentiality or in-person interviews. Moreover, individuals tasked with conducting investigations may have been furloughed or otherwise affected by COVID-19. While these processes should be updated and documented, every effort should be made to maintain confidentiality and existing protocols. The same is true with responding to the whistleblower and determining whether existing processes for that communication need to be revised to reflect work-from-home protocols. With the expected uptick in whistleblower claims and the disruption to a company's internal investigative structure caused by the COVID-19 pandemic, it is possible that a company's ability to address employee complaints could be delayed. While some delay may be understandable, it is imperative that companies not allow whistleblower complaints to fall through the cracks or go unanswered.

- ***Document Retention:*** Companies should evaluate their document retention policies to ensure that key paper and electronic documents are retained. This applies both to potentially relevant business documents as well as documents related to the company's investigation and resolution of any complaints. For instance, to the extent employees are using personal devices to engage in company functions, consider whether there is a sufficient mechanism for key documents to be captured on the company's systems. Similarly, if there is a reduction in force following a complaint, make sure there are steps taken to obtain and retain information from the employees who had their employment terminated and prevent them from taking confidential corporate documents in violation of company policy (while respecting protected whistleblowing activity, including by having appropriate confidentiality carveouts—e.g., under the Defend Trade Secrets Act whistleblower provision—in any separation agreements).
- ***Communications with Government Regulators:*** In light of the heightened government scrutiny, companies should review their existing policies to ensure proper communication with government regulators. Where the whistleblower has already approached regulators, protocols should ensure effective and prompt communication back to the government throughout the internal investigation. Where the complaint is entirely internal, a decision-framework should exist to assist in evaluating the potential costs and benefits of self-disclosure to government regulators.
- ***Use of Outside Counsel:*** As always, companies should consider when it may be necessary to consult with outside counsel in response to a whistleblower claim. With an anticipated uptick in whistleblower activity, it will be more important than ever to assess at the outset which complaints are significant enough to engage outside counsel—for example, those in which regulators or plaintiffs' attorneys are already involved or those involving novel laws and programs relating to COVID-19—and those that can appropriately be handled internally.

[1] Rebecca Rainey and Nolan D. McCaskill, “‘No words for this’: 10 million workers file jobless claims in just two weeks,” Politico (Apr. 2, 2020), *available at* <https://www.politico.com/news/2020/04/02/unemployment-claims-coronavirus-pandemic-16108>.

- [2] *See, e.g.*, Ben Winck, “Nobel-winning economist Paul Krugman sees unemployment soaring to 20% in a matter of weeks,” *Business Insider* (Apr. 3, 2020), *available at* <https://www.businessinsider.com/paul-krugman-says-unemployment-spikes-soar-forecast-weeks-coronavirus-layoffs-2020-4>; Tommy Reggiori and Sujata Rao, “U.S. Economy to Shrink at Fastest Rate Since 1946, Unemployment to Top 15%: Morgan Stanley,” *U.S. News and World Report* (Apr. 3, 2020), *available at* <https://money.usnews.com/investing/news/articles/2020-04-03/us-economy-to-shrink-at-fastest-rate-since-1946-unemployment-to-top-15-morgan-stanley>.
- [3] Liz Hoffman and Marcelo Prince, “The Month Coronavirus Felled American Business,” *Wall Street Journal* (Apr. 4, 2020), *available at* <https://www.wsj.com/graphics/march-changed-everything/>.
- [4] For example, on April 3, 2020, the SEC announced an award of approximately \$2 million to a whistleblower who provided information and assistance that substantially contributed to an ongoing investigation. *See* Securities and Exchange Commission, “SEC Awards Approximately \$2 Million to Whistleblower,” (Apr. 3, 2020), *available at* <https://www.sec.gov/news/press-release/2020-80>.
- [5] 31 U.S.C. §§ 3729-3733.
- [6] Gibson Dunn, “Implications of COVID-19 Crisis for False Claims Act Compliance,” (Mar. 31, 2020), *available at* <https://www.gibsondunn.com/implications-of-covid-19-crisis-for-false-claims-act-compliance/>.
- [7] Pub. L. No. 107-204, 107th Cong. (2002).
- [8] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 111th Cong. (2010).
- [9] *See, e.g.*, Securities and Exchange Commission, “SEC Announces Largest-Ever Whistleblower Award,” (Sep. 22, 2014), *available at* <https://www.sec.gov/news/press-release/2014-206> (noting SEC whistleblower award of more than \$30 million). This activity does not show any signs of slowing, notwithstanding the current COVID-19 pandemic. *See supra* note 4.
- [10] <https://www.sec.gov/whistleblower>.
- [11] *See, e.g.*, N.J. Stat. Ann. §§ 2A:32C-1 et seq. (New Jersey False Claims Act); Cal. Gov’t Code §§ 12650 et seq. (California False Claims Act).
- [12] Department of Justice, “Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud,” Mar. 20, 2020, *available at* <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud>.

- [13] William Barr, “Memorandum on COVID-19 – Department of Justice Priorities,” Department of Justice (Mar. 16, 2020), *available at* <https://www.justice.gov/ag/page/file/1258676/download>.
- [14] See New York State COVID-19 “New York on PAUSE” Enforcement Task Force Violation Complaint Form, *available at* <https://mylicense.custhelp.com/app/ask>; Complaint Forms Available to Report Violations of Coronavirus Mandates, *available at* <https://www.wktv.com/content/news/Complaint-forms-available-to-report-violations-of-NY-state-mandates-569290041.html>.
- [15] California Department of Justice, “Attorney General Becerra Issues Consumer Alert on Price Gouging Following Statewide Declaration of Emergency for Novel Coronavirus Cases in California Communities,” (Mar. 4, 2020), *available at* <https://oag.ca.gov/news/press-releases/attorney-general-becerra-issues-consumer-alert-price-gouging-following-statewide>.
- [16] Jim Brunner, “Washington state attorney general warns 5 businesses to stop coronavirus price-gouging of sanitizer, masks on Amazon,” Seattle Times (Mar. 31, 2020), *available at* <https://www.seattletimes.com/seattle-news/health/state-attorney-general-warns-5-businesses-to-stop-coronavirus-price-gouging-of-sanitizer-masks-on-amazon/>.
- [17] WAOK Radio, “Exclusive: MARTA Whistleblower Says Company Not Protecting Riders From COVID-19,” (Mar. 31, 2020), *available at* <https://waok.radio.com/articles/radiocom/rashad-richey-marta-not-protecting-riders-from-covid-19>.
- [18] Sophie Sherry, “Nurse says she was fired by Northwestern Memorial Hospital after warning co-workers that face masks being used were not the safest,” Chicago Tribune (Mar. 25, 2020), *available at* <https://www.chicagotribune.com/news/breaking/ct-nurse-northwestern-memorial-hospital-coronavirus-20200324-6smjuxbn6fgnxpaiyzzkjymorq-story.html>.
- [19] Federal Charges Filed By Teamsters Against Warren Buffett-Owned Furniture Firm For Mass Firing Of Coronavirus Whistleblowers, Union Supporters, Yahoo! Finance (Apr. 2, 2020), *available at* <https://finance.yahoo.com/news/federal-charges-filed-teamsters-against-201900772.html>.
- [20] H.R. 748, 116th Cong. (2020).
- [21] Heather Caygle, Kyle Cheny and Melanie Zanona, “Pelosi Forms New Select Committee to Oversee \$2 trillion Coronavirus Relief Package,” Politico (April 2, 2020), *available at* <https://www.politico.com/news/2020/04/02/pelosi-forms-new-select-committee-to-oversee-2-trillion-coronavirus-relief-package-161436>.
- [22] Jason C. Schwartz and Lisa J. Banks, “Whistleblower Law: A Practitioner’s Guide,” American Lawyer Media/Law Journal Press.



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