

LR #13 WHISTLEBLOWER PROGRAM: Enact Anti-Retaliation Legislation to Protect Tax Whistleblowers

TAXPAYER RIGHTS IMPACTED¹

- The Right to Challenge the IRS's Position and Be Heard
- The Right to Appeal an IRS Decision in an Independent Forum
- The Right to a Fair and Just Tax System

PROBLEM

In recognition of the valuable role whistleblowers can play in detecting underpayments of tax and to encourage whistleblowers to come forward, Internal Revenue Code (IRC) § 7623 permits, and in some cases requires, the IRS to compensate those who report violations of the internal revenue laws.² In this respect, the IRC is similar to the False Claims Act, which allows whistleblowers who report fraud on the government to share in amounts recovered from the wrongdoer.³ In 2006, Congress amended the whistleblower provisions of the IRC to more closely parallel the provisions of the False Claims Act.⁴ However, the IRC, unlike the False Claims Act and unlike whistleblower statutes that apply in other areas of the law, does not protect tax whistleblowers from retaliation.⁵ This lack of protection could impede employees, who may have unique skills and insights, from investigating and ascertaining whether their employers underpay taxes and from reporting those underpayments to the government.

EXAMPLE

While she is employed by X, a whistleblower learns of a tax structure involving X and several related entities and subsidiary companies.⁶ When she raises concerns over the tax structure to X, X uses physical force and armed men to intimidate her, then fires her. The whistleblower reports X and the related entities to the government, assists the government with its tax investigation of X and the related entities, and is subpoenaed to provide documents to the government as part of the investigation. X and the related entities learn of the subpoena (but not the whistleblower's identity) and file multiple retaliatory actions against the whistleblower to ascertain her identity and her role in the tax investigation and to threaten and intimidate her. Defending these actions consumes the whistleblower's time, requires her to incur significant personal expense, and adversely affects her professional reputation. X and the related entities also make death threats against the whistleblower, which forces her to hire counterterrorism experts to advise her family on safety and to protect her on trips abroad.

1 See Taxpayer Bill of Rights, available at www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

2 IRC § 7623.

3 False Claims Act, 31 U.S.C. §§ 3729-3733, discussed below.

4 For a discussion of the legislative history of IRC § 7623 and the False Claims Act, see Most Serious Problem: *Whistleblower Program: The IRS Whistleblower Program Does Not Meet Whistleblowers' Need for Information During Lengthy Processing Times and Does Not Sufficiently Protect Taxpayers' Confidential Information from Re-Disclosure by Whistleblowers*, supra.

5 31 U.S.C. § 3730(h), discussed below, contains the anti-retaliation provisions of the False Claims Act.

6 The facts of this example are based on the court's description of events in *Whistleblower 11332-13W v. Comm'r*, T.C. Memo. 2014-92.

There are no IRC provisions affording the whistleblower a remedy for the retaliation she experienced as a consequence of investigating whether X and the related companies underpaid taxes and reporting the underpayments to the government. Other potential whistleblowers faced with this lack of protection from retaliation may hesitate to ascertain whether their employers underpay tax and may decide not to report tax underpayments to the government. Those who do come forward may hesitate to contest the IRS's award determination out of fear that further proceedings will increase the chances their employers will learn their identity and retaliate against them, for which they will have no remedy under the IRC.

RECOMMENDATIONS

To address the lack of a remedy available to tax whistleblowers subject to retaliation, the National Taxpayer Advocate recommends that Congress add a new provision to the IRC modeled on the anti-retaliation provisions of the False Claims Act.

PRESENT LAW

The False Claims Act provides for a civil suit for statutory penalties and damages against a person who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval,” and allows a whistleblower to share in the collected proceeds from such a suit.⁷ In 1986, recognizing that “few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment, or any other form of retaliation,” Congress added an anti-retaliation provision to the False Claims Act.⁸ Amendments in 2009 extended anti-retaliation protection to “[a]ny employee, contractor, or agent,” and clarified that the provision:

Protects not only steps taken in furtherance of a potential or actual *qui tam* action, but also steps taken to remedy the misconduct through methods such as internal reporting to a supervisor or company compliance department and refusals to participate in the misconduct that leads to the false claims, whether or not such steps are clearly in furtherance of a potential or actual *qui tam* action.⁹

Further amendments in 2010 supplied a three-year statute of limitations for seeking relief from retaliatory conduct.¹⁰

⁷ See 31 U.S.C. § 3729(a)(1)(A)-(G) for enumerated acts that give rise to liability. Under the False Claims Act, if the government declines to bring a civil suit for statutory penalties and damages on the basis of a whistleblower's information, the whistleblower may bring suit on behalf of the government, in what is referred to as a *qui tam* suit, and share in the collected proceeds. 31 U.S.C. § 3730. Whistleblowers in other areas of the law who are protected from retaliation are not necessarily rewarded for identifying or reporting illicit activity. See Joel D. Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, 6 Liberty U. L. Rev. 51 (2011), grouping federal whistleblower statutes into six categories: (1) reporting fraud against the government; (2) federal employees reporting violations of laws, waste, or mismanagement; (3) reporting discrimination; (4) reporting violations of environmental laws; (5) reporting conduct adverse to health; and (6) reporting violations of securities law.

⁸ False Claims Amendments Act of 1986, S. Rep. No. 99-345, at 34, reprinted in 1986 U.S.C.C.A.N. 5266, 5299.

⁹ Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009), extending protection not only to acts taken “in furtherance of an action under this section” but also to acts taken “in furtherance of other efforts to stop 1 or more violations of this subchapter [the False Claims Act]”; 155 Cong. Rec. E1295, 1300 (daily ed. June 3, 2009) (statement of Rep. Berman).

¹⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A(c)(2), 124 Stat. 1376, 2077, adding paragraph (3), superseding *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005) (holding that the statute of limitations for the most closely analogous state cause of action applies).

As amended, the anti-retaliation provision of the False Claims Act states:

1. In general. – Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.
2. Relief. – Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 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. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.
3. Limitation on bringing civil action. – A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.¹¹

In addition to federal legislation, many states have anti-retaliation statutes to protect whistleblowers.¹² Notably, New York's False Claims Act proscribes retaliatory conduct by *prospective* employers, important protection for whistleblowers whose chief concern is obtaining and retaining future employment (rather than returning to the job from which they were fired).¹³

The False Claims Act does not apply to tax fraud.¹⁴ The tax whistleblower provision is in IRC § 7623, which Congress amended in 2006 by *requiring* the IRS to pay awards in some cases, creating the IRS Whistleblower Office (WO), and providing for United States Tax Court review of the WO's award determinations.¹⁵ The purpose of the amendments was to encourage tax whistleblowers.¹⁶ In 2012, the Tax Court, recognizing that whistleblowers sometimes face serious threats of retaliation, formalized its procedures for allowing whistleblowers to proceed anonymously.¹⁷ However, neither IRC § 7623 nor any other Code provision contains an anti-retaliation provision.

11 31 U.S.C. § 3730(h).

12 Ethan D. Wohl, *Confidential Informants in Private Litigation: Balancing Interests in Anonymity and Disclosure*, 12 *FORDHAM J. CORP. & FIN. L.* 551, 557 (2007), noting that “forty-seven states have enacted statutes protecting public-sector whistleblowers, and seventeen states also provide some statutory protection for private sector employees who report illegal conduct.”

13 N.Y. State Fin. Law § 191 (2010).

14 31 U.S.C. § 3729(d) provides: “[t]his section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.”

15 Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432 § 406(a)(1)(D), (b), 120 Stat. 2922, 2958-2959 (adding subsection (b) to IRC § 7623 and in an “off-Code” provision creating the Whistleblower Office); IRC § 7623(b)(4) (providing for Tax Court review of the IRS's award determination).

16 See *Grassley Says IRS, Treasury Need to Put Out “Welcome Mat” for Whistleblowers*, 2006 TNT 112-96 (June 12, 2006).

17 See *Whistleblower 14106-10-W v. Comm’r*, 137 T.C. 183, 203 (2011), noting the anti-retaliation provision of the False Claims Act, the existence of state statutes protecting workers who report illegal conduct from retaliation, and the “stark” contrast with the lack of an anti-retaliation provision in IRC § 7623; U.S. Tax Court Rules of Practice and Procedure, Rule 345, *Privacy Protections for Filings in Whistleblower Actions* (effective July 6, 2012); see also U.S. Tax Court, *Press Release* (Dec. 28, 2011), available at www.ustaxcourt.gov/press/122811.pdf (discussing the adoption of a new Rule 345).

REASONS FOR CHANGE

Employees may be uniquely qualified to detect their employers' underpayments of tax, and in many instances, the only way the IRS would know about a given transaction or behavior is because someone blew the whistle. Congress, by amending IRC § 7623 in 2006, intended to encourage tax whistleblowers to come forward. However, if the employer learns of an employee's investigation or that the employee reported its tax underpayments to the government, then retaliation against the employee may ensue. The Tax Court recognized this reality and adjusted its rules accordingly.¹⁸ Despite the IRS's and Tax Court's measures to protect whistleblowers' identities, it may not be difficult for an employer to determine who, out of a small group of informed employees, came forward to the IRS. As one district court judge observed:

The case law, academic studies, and newspaper accounts well document the kind of treatment that is usually visited upon public and private employees who speak out as a matter of conscience on issues of public concern. For example, a six-year study on whistleblowers by Myron Peretz Glazer and Penina Migdal Glazer details the full spectrum of management retaliation against ethical resisters who speak out against company or government policy and the long-term adverse consequences such employees can face. See Myron Peretz Glazer and Penina Migdal Glazer, *The Whistleblowers: Exposing Corruption in Government and Industry* 231 (1990) (study of sixty-four whistleblowers showed significant percentage "remain out of work or underemployed, bitter about their punishment, and uncertain of ever being able to restore their lives fully").¹⁹

Faced with the possibility of retaliation, for which the IRC provides no remedy, tax whistleblowers may be reluctant to investigate or report tax underpayments. The lack of an anti-retaliation provision may undermine Congress's efforts to encourage tax whistleblowers. The lack of such a provision may also have a chilling effect on whistleblowers' willingness to challenge the IRS's determination of the amount of their award. A whistleblower may prefer to truncate or avoid altogether any administrative or judicial proceeding, fearing an increased likelihood his or her identity will become known and will result in retaliation for which there will be no remedy under the IRC.

EXPLANATION OF RECOMMENDATIONS

The proposal would require a new IRC provision or the amendment of an existing provision to provide a remedy for a tax whistleblower who is subjected to retaliation for investigating or reporting underpayments of tax. The provision could be modeled on section 3730(h) of the False Claims Act, and could further be made applicable to prospective employers. Providing protection from retaliation to tax whistleblowers would place them on similar footing as whistleblowers in other areas of the law, would further Congress's objective of encouraging them to come forward, and would support their rights to pursue administrative and judicial review of the IRS's award determination.

18 See *Whistleblower 14106-10-W v. Comm'r*, 137 T.C. 183, 201 (2011), quoting *Mgmt. Info. Technologies, Inc. v. Alyeska Pipeline Serv., Co.*, 151 F.R.D. 478, 481 (D.D.C. 1993).

19 *Mgmt. Info. Technologies, Inc. v. Alyeska Pipeline Serv., Co.*, 151 F.R.D. 478, 481 (D.D.C. 1993).