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Developments in Whistleblower Cases

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I. Introduction

This paper addresses selected developments concerning whistleblower cases, from the perspective of a worker-side attorney. This paper is not a general update — it targets significant developments. The presentation associated with this paper addresses practical issues that the law does not address — the drivers behind large verdicts and judgments.

This paper is intended to assist with a better understanding of selected developments in whistleblower cases. It is not intended as legal advice.

II. Immunity and protections for whistleblower disclosures of trade secrets and confidential information

A. Common counter to whistleblowers — claims concerning disclosure of trade secrets and confidential information

It is not unusual for a defendant to counter a whistleblower claim with requested remedies concerning the whistleblower's disclosure of trade secrets. The requested remedy varies — *e.g.*, sanctions for including trade secrets in a pleading, counterclaims alleging violation of trade secret laws, and separate lawsuits alleging violation of trade secret laws. This section addresses recent expansion of immunity and protections for whistleblower disclosures of trade secrets and confidential information.

B. The Defend Trade Secrets Act — immunity and protections for disclosure of trade secrets

The Defend Trade Secrets Act expanded immunity and other protections for certain disclosures and uses of trade secrets. The Act states in that regard:

1833 Exceptions to prohibitions

(a) **In General.**—This chapter does not prohibit or create a private right of action for—

* * *

(2) the disclosure of a trade secret in accordance with subsection (b).

(b) Immunity From Liability for Confidential Disclosure of a Trade Secret to the Government or in a Court Filing.—

(1) Immunity.—An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that—

(A) is made—

(i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; *and*

(ii) solely for the purpose of reporting or investigating a suspected violation of law; *or*

(B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

(2) Use of trade secret information in anti-retaliation lawsuit.—An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual—

(A) files any document containing the trade secret under seal; *and*

(B) does not disclose the trade secret, except pursuant to court order.¹

What does this mean? Courts have not provided much guidance as of the date this paper was completed.² But the statutory text provides a start.

¹ 18 U.S.C. § 1833(a)-(b)(2) (emphasis added).

² See, e.g., *Unum Group v. Loftus*, No. 4:16-CV-40154, 2016 WL 7115967, *2 (D. Mass. Dec. 6, 2016) (declining to reach merits of Defend Trade Secrets Act immunity claim at motion to dismiss stage); see also Peter S. Menell, *Misconstruing Whistleblower Immunity Under the*

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