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How To Navigate Claims Brought By 'Trust' Employees

Law360 on **August 31, 2022**

In a typical enterprise, most employees are hired to further the primary mission of the organization — whether providing goods and services, creating new products, engaging in sales and marketing, and so forth.

Other employees, however, are tasked with the important objective of protecting the organization itself. These individuals occupy positions of trust, are often members of the C-Suite, and also often work in the legal, human resources, employee relations, and/or diversity, equity and inclusion departments.

But what should an employer do when one of these trust employees or corporate gatekeepers sue the very organization they were hired to protect?

Such cases can be perceived as particularly damning and raise the specter of heightened reputational damage to the organization because employees in positions of trust are uniquely positioned to weaponize sensitive information to which they were privy solely by virtue of their positions.

We have recently observed a notable uptick in potential employment claims by corporate gatekeepers. Although many of these sensitive matters are quickly and quietly resolved through a negotiated settlement, some are publicly litigated. [1]

As claims by corporate gatekeepers are on the rise, employers facing such claims could benefit from considering various measures.

Take Immediate Steps to Protect Confidential Information

When an employee attempts to leverage their insider knowledge by disclosing confidential information in a publicly filed lawsuit, consider filing motions to seal and to strike, and seek a temporary restraining order to enjoin the employee from disclosing any further confidential information.

The employer should be prepared to act quickly, as the risk of confidential information being disseminated further, including by the media, will only increase the longer it remains accessible on the public docket.

Motion to Seal

A motion to seal asks the court to seal portions of pleadings and exhibits containing confidential information. When reviewing a motion to seal, courts typically apply a rebuttable presumption of public access to judicial documents. [2]

In order to overcome this presumption, the employer may need to demonstrate that it in fact protects the information it seeks to seal as highly confidential, and that the harm to the employer caused by disclosure would be so substantial that it should outweigh the public's interest in access.

A motion to seal may be particularly appropriate where the plaintiff is an in-house attorney for the employer. Notably, courts have found sealing to be warranted not just to protect attorney-client privileged information, but also to protect the much broader category of client confidences.

In New York, for example, attorneys are prohibited from revealing any information learned in connection with the representation of a client that is likely to be embarrassing or detrimental to the client if disclosed, as well as information that the client has requested be kept confidential. [3]

Motion to Strike

Under Rule 12(f) of the Federal Rules of Civil Procedure — and many state analogues — a court may strike from a pleading "any redundant, immaterial, impertinent or scandalous matter." Even where information in a pleading is relevant to the claims, it nevertheless may be stricken if it is described in needless detail. [4]

Motions to strike are generally viewed by courts with disfavor, however, so the allegations in the complaint will need to be particularly egregious for such a motion to likely succeed.

Temporary Restraining Order

Because time will frequently be of the essence once confidential information is filed publicly, employers should also consider seeking expedited interim relief in the form of a temporary restraining order, or TRO, in connection with any motion to seal or to strike.

In addition to asking for immediate sealing of the confidential information pending resolution of the motion in due course, the TRO application can also seek to enjoin the employee from making any further improper disclosures.

To obtain a TRO, the employer will need to convince a judge that it will suffer irreparable harm if the confidential information is not immediately removed from the public record.

Consider Going on the Offense

In addition to taking defensive measures in response to a lawsuit, employers can also go on the offensive by terminating the complainant's employment, filing counterclaims for breach of the duty of loyalty, and, in the case of an attorney, pursuing discipline for any violations of the ethical rules governing the legal profession.

Termination of Employment

If an employee has signed a confidentiality agreement or otherwise agreed to comply with an employer's confidentiality policy — such as by signing an acknowledgement to an employee handbook which contains such a policy — termination of employment may be an appropriate consequence for the employee's breach of their confidentiality obligations.

Although anti-retaliation laws are broad, employers have the right to discipline employees for violation of company policies, even after they have filed a lawsuit.

To reduce the risk of a successful retaliation claim, employers should evaluate whether termination is appropriate, and confirm that similarly situated employees have been similarly treated.

It should also go without saying that if the employee is in a role in which they would usually be involved in the investigation of complaints, they must be walled off from any investigation into their own claims.

Counterclaim for Breach of Duty of Loyalty or Faithless Servant

Under the common law of a number of states, employees holding a position of trust and confidence owe a fiduciary duty of loyalty to their employer during their employment.

Where an employee publicly discloses confidential information learned solely because of the trust placed in them, the employer may be able to invoke the faithless servant doctrine to assert a counterclaim against the employee for breaching their duty of loyalty.

Employees found to be disloyal under the faithless servant doctrine may be required to forfeit all compensation received during the period of disloyalty, regardless of whether the employer suffered damages.

Inform Counsel of their Ethical Obligations

Where the employee in a position of trust is an attorney, disclosure of confidential information in the context of a lawsuit against their employer may violate the attorney's ethical obligations.

Under the Model Rules of Professional Conduct promulgated by the American Bar Association, which serve as the model for the attorney ethics rules in many jurisdictions, there is an exception to the general prohibition against revealing client confidences where a lawyer reasonably believes disclosure is necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." [5]

However, not all jurisdictions have adopted this exception in full. In New York, for example, lawyers may only reveal confidential information defensively to defend against an accusation of wrongful conduct, but notably are not permitted to use such information offensively to establish a claim. [6]

Courts have taken divergent views on how to handle a conflict between ethical rules prohibiting the offensive disclosure of client confidences and an employee's desire to assert a whistleblower claim that requires a breach of those confidences.

In United States v. Quest Diagnostics Inc. in 2013, the U.S. Courts of Appeals for the Second Circuit, for example, held that the defendant's former general counsel was barred from pursuing a whistleblower lawsuit under the False Claims Act because the allegations were premised on privileged information. [7]

In Wadler v. Bio-Rad Laboratories Inc. in 2016, U.S. Magistrate Judge Joseph C. Spero of the U.S. District Court for the Northern District of California reached a different conclusion in a closely watched whistleblower lawsuit brought by Bio-Rad's former general counsel when he permitted the plaintiff to use privileged documents and information at trial.

He ruled that the Sarbanes-Oxley Act's whistleblower protections preempted California's ethical rules regarding the disclosure of privileged and confidential information. [8]

If an attorney discloses client confidences in a jurisdiction that does not allow the use of such information to prosecute a claim, the employer should consider reminding the attorney-employee of their ethical obligations.

The communication can warn the employee that they, as well as their legal counsel in the litigation, may have breached the ethical rules and demand that they immediately withdraw the lawsuit or risk disciplinary action.

Conclusion

Defending against claims brought by the very employees hired to protect the employer presents unique challenges.

It would behoove employers to have a plan in place to proactively address this situation if and when it arises.

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[1] See, e.g., Kott v. Nat'l Med. Care, Inc. (complaint filed on March 12, 2022 in Massachusetts state court by former General Counsel); Christian Robbins v. Capna Fabrication, Inc. et al. (complaint filed on February 23, 2022 in California state court by former Human Resources Director); DiLorenzo v. J. Crew Group, LLC et al. (complaint filed on December 16, 2021 in the U.S. District Court for the Southern District of New York by former General Counsel).

[2] See, e.g., Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119 (2d Cir. 2006) (noting that "[t]he common law right of public access to judicial documents is firmly rooted in our nation's history").

[3] See New York rules of Professional Conduct, Rule 1.6(a).

[4] See Cabble v. Rollieson, 2006 WL 464078, at *11 (S.D.N.Y. Feb. 27, 2006).

[5] ABA Model Rules of Professional Conduct, Rule 1.6(b)(5).

[6] New York rules of Professional Conduct, Rule 1.6(b)(5)(i).

[7] United States v. Quest Diagnostics Inc., 734 F.3d 154 (2d Cir. 2013).

[8] Wadler v. Bio-Rad Lab'ys, Inc., 212 F. Supp. 3d 829 (N.D. Cal. 2016).

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